Term of Appeal Ct. A.

[illegible] Term

TRANSCRIPT OF RECORD. 6

[illegible] COURT OF THE UNITED STATES.

No. 261.

[illegible] OF THE STATE OF NEW YORK EX REL. [illegible] OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

[illegible] OF SUPERVISORS OF THE COUNTY OF NEW YORK.

TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED JANUARY 28, 1899.

1 The answer of the judges of the Court of Appeals of the State of New York, in the within writ named, doth certify, under the seal of our said court, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, and send the record whereof mention in said writ is made, with all things touching or in anywise concerning the same, as appears in a certain schedule to this writ annexed, as within it is commanded.

By the court.

Ja'y 7th, 1868.

[SEAL.]

C. H. YOUNG,
Deputy Clerk of the Court of Appeals of the State of New York.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Court of Appeals of the State of New York, greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said Court of Appeals before you between the people of the State of New York, *ex rel.* the Bank of New York and the board of supervisors of the county of New York, a manifest error hath happened to the great damage of the said relators as by their complaint appears; and it being fit that the error if any there hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded if judgment be therein given, that then

3 under your seal distinctly and openly you send the record and the proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the ninth day of January, 1868 instant, in the said Supreme Court, to be then and there holden, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fourth day of January, A. D. eighteen hundred and sixty-eight, and of the independence of the United States the ninety-first.

KENNETH G. WHITE, *Clerk.*

Endorsed: Supreme Court of the United States. The People of the State of New York *ex rel.* The Bank of New York, pl'ff in error, against The Board of Supervisors of the County of New York, def'ts in error. Writ of error. Wheeler H. Peckham, att'y for pl'ff in error, 18 Wall st., New York city.

4 UNITED STATES OF AMERICA, *ss:*

To the board of supervisors of the county of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on

the ninth day of January instant, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of New York, wherein the people of the State of New York *ex rel.* the Bank of New York are plaintiff, and you are defendant in error, to show cause if any there be why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

5 Witness the Honorable William B. Wright, chief justice of the Court of Appeals of the State of New York, this day of January, A. D. 1868.

WM. B. WRIGHT,
Ch. Judge of Court of Appeals of State of New York.

I agree to the short return day of the writ of error and citation, and hereby admit due service of the foregoing citation by copy.
Ja'y 7, 1868.

RICHARD O'GORMAN,
Legal Adviser of the Board of Supervisors and Attorney for Defendants in Error.

Endorsed: Supreme Court of the United States. The People of the State of New York *ex rel.* The Bank of N. Y. against The Board of Supervisors of the County of New York. Citation. Wheeler H. Peckham, att'y for pl'ff in error, 18 Wall st., N. York city.

6 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* The Bank of New York
against
THE BOARD OF SUPERVISORS OF THE COUNTY of New York.

Know all men by these presents, that we, George M. Miller and John A. Stoutenburgh, of the city of New York, are held and firmly bound unto the above, the board of supervisors of the county of New York, in the sum of one thousand dollars, to be paid to the said board, its successors, &c., to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our heirs, executors, administrators and assigns firmly by these presents. Sealed with our seals and dated the 4th day of January, 1868.

Whereas the plaintiff above named hath prosecuted a writ of error to the Supreme Court of the United States to reverse the
7 judgment rendered in the above-entitled suit by the Court of Appeals of the State of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute their said writ of error to effect and answer all damages and costs, if they shall fail to make good their plea then this obligation shall be void, otherwise the same shall remain and be in full force and virtue.

[L. S.] (S'd) GEORGE M. MILLER,
[L. S.] J. A. STOUTENBURGH.

STATE OF NEW YORK, *City and County of New York, ss*:

George M. Miller, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and freeholder within this State, and is worth the sum of two thousand dollars over all his debts and liabilities, and besides his property by law exempt from execution.

GEORGE M. MILLER.

Sworn to before me this 4th day of January, 1868.

GEO. D. PHELPS, JR.,
8 *Notary Public, N. Y.*

STATE OF NEW YORK, *City and County of New York, ss*:

John A. Stoutenburgh, one of the subscribers to the foregoing undertaking, being sworn, says that he is a resident and freeholder within this State, and is worth the sum of two thousand dollars over and above all his debts and liabilities, and besides his property exempt from execution.

J. A. STOUTENBURGH.

Sworn to before me this 4th day of January, 1868.

GEO. D PHELPS, JR.,
Notary Public, N. Y.

STATE OF NEW YORK, *City and County of New York, ss*:

On this fourth day of January, A. D. one thousand eight hundred and sixty-eight, before me came George M. Miller and John A. Stoutenburgh, known to me to be the persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

GEO. D. PHELPS, JR.,
Notary Public, N. Y.

Endorsed: Supreme Court of the United States. The People of the State of New York *ex rel.* The Bank of New York ag'st The Board of Supervisors of the County of New York. "Copy" bond. 'Approved:' Wm. B. Wright, ch. judge of Court of Appeals.

9 At a term of the Court of Appeals of the State of New York, held at the capitol in the city of Albany, on the 31st day of December, 1868. Present: Hon. Henry E. Davies, chief judge, presiding.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* The Bank of New York, app'l't,
against
THE BOARD OF SUPERVISORS OF THE COUNTY of New York, resp'ts.

The appeal in this cause having been argued by Mr. Peckham, of counsel for the relators, and Mr. O'Gorman, of counsel for the respondents defendants, and due deliberation being had thereon, it is

ordered and adjudged that the judgment of the Supreme Court appealed from be and the same is hereby in all things affirmed with cost to the defendants respondents. And it is further certified that on the hearing of this cause there was drawn in question in
10 said cause the validity of a statute of, and an authority exercised under the State of New York, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity, and also that there was drawn in question the construction of the clause of the Constitution authorizing Congress to borrow money on the credit of the United States, and of certain statutes of the United States exempting certain securities of the United States from taxation by State authority, and the decision was against the right, title, privilege, and exemption claimed by the appellants under such clause of the Constitution and such statutes.

C. H. YOUNG, *Deputy Clerk.*

11 Pleas before the Supreme Court of the State of New York, at a special term thereof, held at the City Hall, in and for the county of New York, on the seventh day of March, 1867.

Witness: Hon. Wm. H. Leonard, justice.

WILLIAM C. CONNER, *Clerk.*

The people of the State of New York to the board of supervisors of the county of New York, greeting:

Whereas the Bank of New York was, during the years 1863 and 1864, and for many years prior thereto was and still is a banking corporation, duly organized under the laws of the State of New York, and was doing business in the city and county of New York;

And whereas, during the years 1863 and 1864, the said bank of New York paid taxes in and to the county of New York to a very large amount, to wit, in the sum of about one hundred thousand dollars;

And whereas the capital of said bank during both of said years was three million dollars:

And whereas a large proportion of said capital was invested in certain securities of the United States, by the Constitution and laws of the United States exempt from State taxation;

And whereas, pursuant to the statute of this State, passed April 3d, 1866, entitled "An act to provide for refunding to various banks and insurance companies the taxes of the years 1863 and 1864, imposed or paid or collected upon that portion of their capital invested in securities of the United States by law exempt from tax-
12 ation," the said bank of New York did present to the board of supervisors of the county of New York the claims of said bank for an issue of bonds under the said act;

And whereas you, the said board of supervisors of the county of New York, did audit and allow to said bank its claims for taxes paid on certain descriptions of United States securities, but did refuse to audit or allow to said bank its claims for taxes paid in said years in

said county on so much of its capital as was invested in United States notes issued under the acts of Congress of February 25, 1862; July 11, 1862; the joint resolution of Congress of January 17, 1863; and the act of Congress of March 3, 1863;

And whereas after you, the said board, had audited the amount of taxes paid in said years by said bank on capital of said bank invested in said years in certain United States securities, other than the said United States notes, issued under the acts aforesaid, there remained a large amount of taxes paid by said bank in said years in and to the county of New York on a portion of the capital of said bank not so invested;

And whereas a portion of the taxes so paid was paid on capital of said bank invested in the said United States notes issued under the acts aforesaid, and a portion on capital not invested in United States securities of any kind, or at all;

And whereas the said bank requested and demanded of you, the said board of supervisors of New York, to audit the amount of taxes paid in said years by said bank on the portion of the capital of said bank so invested in said United States notes;

And whereas the said board refused so to do, on the ground that said United States notes were not exempt from State taxation, and refused to audit, inquire, ascertain or investigate, or to listen to any statement or evidence concerning what amount or sum had been paid by said bank during said years on that portion of its capital invested in said United States notes;

13 And whereas the auditing of the said claims of said bank for the issue of said bonds, under the act aforesaid, was by the said board of supervisors referred to a committee to audit and report to the said board:

And whereas the said committee proceeded by taking the whole amount of taxes paid by the said bank on its capital in said years, and then making therefrom deductions for such portions of said taxes as the amount of the capital of the said bank not invested in United States securities bore to the amount of said capital so invested;

And whereas the said committee reported said deductions, and that said "deductions would have been less had said United States notes been considered United States securities, and exempt from taxation as was claimed by said bank;"

And whereas you, the said board, adopted, approved, and acted on said report;

And whereas the amount of the capital of the said bank, so invested in said United States notes in the year 1863, was twelve hundred and fifty thousand dollars, and the rate of taxation in said year, at which taxes on said amount were actually paid by said bank, was about 2.035 per cent., making the amount of taxes paid in said year by said bank in the county of New York, on capital invested in said United States notes about the sum of twenty-five thousand four hundred and thirty-seven dollars and fifty cents, ($25,437 50;)

And whereas the amount of the capital of said bank so invested in said United States notes in the year 1864, was eight hundred and

ordered and adjudged that the judgment of the Supreme Court appealed from be and the same is hereby in all things affirmed with cost to the defendants respondents. And it is further certified that on the hearing of this cause there was drawn in question in said cause the validity of a statute of, and an authority exercised under the State of New York, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity, and also that there was drawn in question the construction of the clause of the Constitution authorizing Congress to borrow money on the credit of the United States, and of certain statutes of the United States exempting certain securities of the United States from taxation by State authority, and the decision was against the right, title, privilege, and exemption claimed by the appellants under such clause of the Constitution and such statutes.

C. H. YOUNG, *Deputy Clerk.*

Pleas before the Supreme Court of the State of New York, at a special term thereof, held at the City Hall, in and for the county of New York, on the seventh day of March, 1867.

Witness: Hon. Wm. H. Leonard, justice.

WILLIAM C. CONNER, *Clerk.*

The people of the State of New York to the board of supervisors of the county of New York, greeting:

Whereas the Bank of New York was, during the years 1863 and 1864, and for many years prior thereto was and still is a banking corporation, duly organized under the laws of the State of New York, and was doing business in the city and county of New York;

And whereas, during the years 1863 and 1864, the said bank of New York paid taxes in and to the county of New York to a very large amount, to wit, in the sum of about one hundred thousand dollars;

And whereas the capital of said bank during both of said years was three million dollars:

And whereas a large proportion of said capital was invested in certain securities of the United States, by the Constitution and laws of the United States exempt from State taxation;

And whereas, pursuant to the statute of this State, passed April 3d, 1866, entitled "An act to provide for refunding to various banks and insurance companies the taxes of the years 1863 and 1864, imposed or paid or collected upon that portion of their capital invested in securities of the United States by law exempt from taxation," the said bank of New York did present to the board of supervisors of the county of New York the claims of said bank for an issue of bonds under the said act;

And whereas you, the said board of supervisors of the county of New York, did audit and allow to said bank its claims for taxes paid on certain descriptions of United States securities, but did refuse to audit or allow to said bank its claims for taxes paid in said years in

said county on so much of its capital as was invested in United States notes issued under the acts of Congress of February 25, 1862; July 11, 1862; the joint resolution of Congress of January 17, 1863; and the act of Congress of March 3, 1863;

And whereas after you, the said board, had audited the amount of taxes paid in said years by said bank on capital of said bank invested in said years in certain United States securities, other than the said United States notes, issued under the acts aforesaid, there remained a large amount of taxes paid by said bank in said years in and to the county of New York on a portion of the capital of said bank not so invested;

And whereas a portion of the taxes so paid was paid on capital of said bank invested in the said United States notes issued under the acts aforesaid, and a portion on capital not invested in United States securities of any kind, or at all;

And whereas the said bank requested and demanded of you, the said board of supervisors of New York, to audit the amount of taxes paid in said years by said bank on the portion of the capital of said bank so invested in said United States notes;

And whereas the said board refused so to do, on the ground that said United States notes were not exempt from State taxation, and refused to audit, inquire, ascertain or investigate, or to listen to any statement or evidence concerning what amount or sum had been paid by said bank during said years on that portion of its capital invested in said United States notes;

13 And whereas the auditing of the said claims of said bank for the issue of said bonds, under the act aforesaid, was by the said board of supervisors referred to a committee to audit and report to the said board:

And whereas the said committee proceeded by taking the whole amount of taxes paid by the said bank on its capital in said years, and then making therefrom deductions for such portions of said taxes as the amount of the capital of the said bank not invested in United States securities bore to the amount of said capital so invested;

And whereas the said committee reported said deductions, and that said "deductions would have been less had said United States notes been considered United States securities, and exempt from taxation as was claimed by said bank;"

And whereas you, the said board, adopted, approved, and acted on said report;

And whereas the amount of the capital of the said bank, so invested in said United States notes in the year 1863, was twelve hundred and fifty thousand dollars, and the rate of taxation in said year, at which taxes on said amount were actually paid by said bank, was about 2.035 per cent., making the amount of taxes paid in said year by said bank in the county of New York, on capital invested in said United States notes about the sum of twenty-five thousand four hundred and thirty-seven dollars and fifty cents, ($25,437 50;)

And whereas the amount of the capital of said bank so invested in said United States notes in the year 1864, was eight hundred and

ordered and adjudged that the judgment of the Supreme Court appealed from be and the same is hereby in all things affirmed with cost to the defendants respondents. And it is further certified that on the hearing of this cause there was drawn in question in
10 said cause the validity of a statute of, and an authority exercised under the State of New York, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity, and also that there was drawn in question the construction of the clause of the Constitution authorizing Congress to borrow money on the credit of the United States, and of certain statutes of the United States exempting certain securities of the United States from taxation by State authority, and the decision was against the right, title, privilege, and exemption claimed by the appellants under such clause of the Constitution and such statutes.

C. H. YOUNG, *Deputy Clerk.*

11 Pleas before the Supreme Court of the State of New York, at a special term thereof, held at the City Hall, in and for the county of New York, on the seventh day of March, 1867.

Witness: Hon. Wm. H. Leonard, justice.

WILLIAM C. CONNER, *Clerk.*

The people of the State of New York to the board of supervisors of the county of New York, greeting:

Whereas the Bank of New York was, during the years 1863 and 1864, and for many years prior thereto was and still is a banking corporation, duly organized under the laws of the State of New York, and was doing business in the city and county of New York;

And whereas, during the years 1863 and 1864, the said bank of New York paid taxes in and to the county of New York to a very large amount, to wit, in the sum of about one hundred thousand dollars;

And whereas the capital of said bank during both of said years was three million dollars:

And whereas a large proportion of said capital was invested in certain securities of the United States, by the Constitution and laws of the United States exempt from State taxation;

And whereas, pursuant to the statute of this State, passed April 3d, 1866, entitled "An act to provide for refunding to various banks and insurance companies the taxes of the years 1863 and 1864, imposed or paid or collected upon that portion of their capital invested in securities of the United States by law exempt from tax-
12 ation," the said bank of New York did present to the board of supervisors of the county of New York the claims of said bank for an issue of bonds under the said act;

And whereas you, the said board of supervisors of the county of New York, did audit and allow to said bank its claims for taxes paid on certain descriptions of United States securities, but did refuse to audit or allow to said bank its claims for taxes paid in said years in

said county on so much of its capital as was invested in United States notes issued under the acts of Congress of February 25, 1862; July 11, 1862; the joint resolution of Congress of January 17, 1863; and the act of Congress of March 3, 1863;

And whereas after you, the said board, had audited the amount of taxes paid in said years by said bank on capital of said bank invested in said years in certain United States securities, other than the said United States notes, issued under the acts aforesaid, there remained a large amount of taxes paid by said bank in said years in and to the county of New York on a portion of the capital of said bank not so invested;

And whereas a portion of the taxes so paid was paid on capital of said bank invested in the said United States notes issued under the acts aforesaid, and a portion on capital not invested in United States securities of any kind, or at all;

And whereas the said bank requested and demanded of you, the said board of supervisors of New York, to audit the amount of taxes paid in said years by said bank on the portion of the capital of said bank so invested in said United States notes;

And whereas the said board refused so to do, on the ground that said United States notes were not exempt from State taxation, and refused to audit, inquire, ascertain or investigate, or to listen to any statement or evidence concerning what amount or sum had been paid by said bank during said years on that portion of its capital invested in said United States notes;

13 And whereas the auditing of the said claims of said bank for the issue of said bonds, under the act aforesaid, was by the said board of supervisors referred to a committee to audit and report to the said board:

And whereas the said committee proceeded by taking the whole amount of taxes paid by the said bank on its capital in said years, and then making therefrom deductions for such portions of said taxes as the amount of the capital of the said bank not invested in United States securities bore to the amount of said capital so invested;

And whereas the said committee reported said deductions, and that said "deductions would have been less had said United States notes been considered United States securities, and exempt from taxation as was claimed by said bank;"

And whereas you, the said board, adopted, approved, and acted on said report;

And whereas the amount of the capital of the said bank, so invested in said United States notes in the year 1863, was twelve hundred and fifty thousand dollars, and the rate of taxation in said year, at which taxes on said amount were actually paid by said bank, was about 2.035 per cent., making the amount of taxes paid in said year by said bank in the county of New York, on capital invested in said United States notes about the sum of twenty-five thousand four hundred and thirty-seven dollars and fifty cents, ($25,437 50;)

And whereas the amount of the capital of said bank so invested in said United States notes in the year 1864, was eight hundred and

sixty-six thousand dollars, and the rate of taxation in said year, at which taxes on said amount were actually paid by said bank, was about 2.16 per cent., making the amount of taxes paid in said year by said bank, in the county of New York, on capital invested in said United States notes, about the sum of eighteen thousand seven hundred and five dollars and six cents, ($18,705 06;)

And whereas, for each of said sums, amounting together to about the sum of $44,143 10, and interest thereon from the time when the same was paid, the said bank was and is entitled to the issue of bonds as in said act provided;

14 And whereas the said board of supervisors has refused and still does refuse to audit the said claim, and for the reason aforesaid, though required by the said bank so to do, as we are informed by the complaint of the bank of New York, and which complaint we have adjudged to be true, as appears to us of record:

We, therefore, being willing that speedy justice should be done in this behalf, do command and firmly enjoin you, the board of supervisors of the county of New York, that immediately after the receipt of this writ you do proceed to audit and allow the claims of the said bank of New York for the issue of bonds to said bank in pursuance of and under the act of this State, entitled "An act to provide for refunding to various banks and insurance companies in the city of New York, the taxes of the years 1863 and 1864, imposed or paid or collected upon that portion of their capital invested in securities of the United States by law exempt from taxation," passed April 30, 1866, for taxes paid in said years in said county of New York, upon such portions of its capital stock as was in said years invested in said United States notes issued under the acts of Congress aforesaid, together with the amount claimed for costs, charges, and interest on the same, or to signify to us the cause why you cannot or will not audit and allow the said claim, lest in your default complaint should again come to us.

And how you shall have executed this our writ, make known to our Supreme Court at a special term thereof, to be held in the City Hall in and for the county of New York, on the 8th day of March, 1867, and have you then there this writ.

Witness Hon. William H. Leonard, justice of our Supreme Court, at the City Hall, in the city of New York, this 30th day of January, 1867. By the court.

[L. S.] (Signed) WM. C. CONNER, *Clerk*.

Miller, Stoutenburgh & Peckham, attorney, &c., for relators, 18 Wall street.

15 *The answer of the board of supervisors of the county of New York to the within writ.*

The said board of supervisors of the county of New York does hereby certify that it does not traverse or deny any of the allegations contained in the said writ, but admits and believes the same to be true, but claims and alleges that the said United States notes in the said

writ referred to are by the acts of Congress, under which the same were issued, made and declared to be lawful money, and a legal tender in payment of all debts, public and private, within the United States, except duties on imports, and interest on certain bonds and notes and certificates of deposit of the United States; and, therefore, this said board did not audit the claims of said bank, founded on taxes paid in said years, on the capital of said bank so invested in said United States notes.

[SEAL OF BOARD.] (Signed) JOSEPH D. YOUNG,
Clerk of the Board of Supervisors.

RICHARD O'GORMAN,
Counsel to Corporation, Att'y for Def't.

Supreme Court—County of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* The Bank of New York *ag'st* THE BOARD OF SUPERVISORS OF THE COUNTY of New York.

And the said the Bank of New York, the relator in this writ, by Miller, Stoutenburgh & Peckham, its attorneys, says that the said plaintiff says that the said return by the said, the board of supervisors of the county of New York, made to the alternative writ
16 of mandamus, is not sufficient in law to quash the said writ, and that the matters and things therein contained are not sufficient in law to bar or preclude the relator from demanding of the said board the doing of the things in said writ commanded, or to excuse the said board from auditing, and allowing the claim of the plaintiff, as in the said writ set forth. And this the plaintiff and relator is ready to verify.

Wherefore the relator prays judgment for want of a sufficient return in this behalf, and that a peremptory writ issue commanding the said board of supervisors of the county of New York to audit and allow the claim in said writ mentioned.

MILLER, STOUTENBURGH & PECKHAM,
Plaintiff's Attorneys.

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* The Bank of New York *ag'st* THE BOARD OF SUPERVISORS OF THE COUNTY of New York.

And the said defendants say that the said return of the said defendants and the matters therein contained are sufficient in law to quash

the said writ and to bar and preclude the said relator from having and maintaining the aforesaid writ, and this the said defendant is ready to prove and verify at such time and place and in such manner as the court shall award.

Wherefore inasmuch as the said relator hath not answered the said return, or in any manner denied the same, these defendants pray judgment for their costs, and that the said writ may be quashed.

(Signed,) RICHARD O'GORMAN,
Attorney for Defendants.

17 At a special term of the Supreme Court, held in and for the county of New York, at the City Hall, in the city of New York, on the seventh day of March, 1867. Present: Hon. William H. Leonard, justice.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* The Bank of New York *ag'st* THE BOARD OF SUPERVISORS OF THE COUNTY of New York.

This cause having come on to be heard on the alternative writ of mandamus and the return thereto and the demurrer to the return and joinder in demurrer and on the issue of law thereby raised, and after hearing Mr. Peckham for the relator, and Mr. Dean for the defendant, it is ordered that the demurrer be and the same is hereby overruled, and that the defendant have judgment against the relator, with costs.

Ordered further, that all proceedings on the said judgment be stayed until the decision of the general term, provided an appeal be taken within ten days.

Enter. (Signed) WM. H. L., *P. J.*

18 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* The Bank of New York *ag'st* THE BOARD OF SUPERVISORS OF THE COUNTY of New York.

And now this day, before the said Supreme Court, come the parties aforesaid, and it appearing that upon the alternative writ of mandamus and the return thereto, and the demurrer to the return and joinder in said demurrer, and a hearing had thereon, the said demurrer was overruled and judgment ordered for the respondents, defendants, for costs.

Now, therefore, it is considered and adjudged that the said board of supervisors of the county of New York do recover of the relator, the Bank of New York, the sum of twenty dollars, by them laid out

and expended in and about the defence to the said writ of mandamus, adjudged to the said board of supervisors of the county of New York by their assent, and that they have execution thereof.

Judgment signed March 9th, 1867.

WILLIAM C. CONNER, *Clerk*.

19 Supreme Court.

THE PEOPLE OF THE STATE OF New York *ex rel.* The Bank of New York
agst.
THE BOARD OF SUPERVISORS OF the County of New York.

You will please take notice that the plaintiff appeals to the general term of this court from the judgment entererd in above case in favor of the defendants against the plaintiff for twenty dollars cost, and overruling the demurrer of the 'plaintiff to the return of the defendant.

March 9th, 1867.

Yours, &c.,

MILLER, STOUTENBURGH & PECKHAM,
Plaintiff's Attorneys.

To Richard O'Gorman, esq.,att'y for defendants; Wm. C. Conner, esq., clerk Supreme Court.

Opinion of the court.

In the act of 1862, the legal-tender notes are called money. One principal object of the act was to give them currency as money. They draw no interest. They were put in circulation, and have been received in payment of debts, public and private, as money. The validity of the act has been sustained by the court of last resort. The judges of that court, in the different opinions or arguments in relation to the constitutionality of the law, speak of them as issued upon the credit of the government, and as means of borrowing
20 adopted by the government; but the conclusion does not follow that they are not to be considered as money. The notes are not commercially known as public securities, nor are they dealt in as such. It is only indirectly that they operate in favor of the government as a means of borrowing. Unlike government securities in the usual sense of those words, they are payable on demand.

They are not within the exemption from taxation given by statute in respect to the various loans offered by Congress, and were received by government as money when their bonds were offered for sale or to effect a loan. I think Congress did not intend that they should be exempt from local taxation. For these reasons I am inclined to hold them to be money, and as such to be subject to taxation.

21 At a general term of the Supreme Court held at the City Hall, in the city of New York, in and for the county of New York, on the 21st day of March, 1867. Present: Hon. William H. Leonard, D. P. Ingraham, and Josiah Sutherland.

THE PEOPLE OF THE STATE OF New York *ex rel.* The Bank of New York, appellants,
against
THE BOARD OF SUPERVISORS OF the County of New York, respondents.

This cause having come on to be heard on the appeal from the judgment of the special term, and after hearing Mr. Peckham for appellants, and Mr. O'Gorman for respondent, it is ordered that the judgment appealed from be and the same is hereby in all things affirmed, with ten dollars costs.

Enter.

(Signed) WM. H. L., *P. J.*

22 Supreme Court.

THE PEOPLE OF THE STATE OF New York *ex rel.* The Bank of New York, appellants,
against
THE BOARD OF SUPERVISORS OF the county of New York, respondents.

The appeal in this cause having been heard at general term, and an order of general term having been made whereby the judgment appealed from was in all things affirmed; now, therefore, on motion of Richard O'Gorman, attorney for respondents, it is considered and adjudged, that the said judgment be, and the same is hereby in all things affirmed, and that the defendants, the said board of supervisors of the county of New York, do recover of the said relator, the Bank of New York, the sum as in said judgment appealed from expressed, and the sum of ten dollars costs of this appeal adjudged to the said board of supervisors of the county of New York, by their assent, and that they have execution thereof.

Judgment signed March 21st, 1867.

(Signed) WM. C. CONNER, *Clerk.*

Endorsed: Filed March 21, 1867, at 10 o'clock and 43 mins.

23 Supreme Court.

THE PEOPLE OF THE STATE OF New York *ex rel.* The Bank of New York
ag'st
THE BOARD OF SUPERVISORS OF the County of New York.

GENTLEMEN: Take notice that the plaintiff appeals to the Court of Appeals from a judgment of this court, in above action entered on the direction of the general term, affirming the judgment of the special term, and for ten dollars costs.

March 21st, 1867.

Yours, &c.,

MILLER, STOUTENBURGH & PECKHAM,
Plaintiffs' Attorneys.

To Richard O'Gorman, esq., defendants' attorney; William C. Conner, esq., clerk Supreme Court.

STATE OF NEW YORK, *City and County of New York, ss:*

I, William C. Conner, clerk of the Supreme Court of said State, in and for said city and county, do hereby certify that the preceding consists of certified copies of the notice of appeal, the judgment roll appealed from, and the papers on which the court below acted in making such order and judgment.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 21st day of March, 1867.

[SEAL.] (Signed) WM. C. CONNER, *Clerk.*

The general term gave no written opinion.

Supreme Court

OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK,
EX REL, THE BANK OF NEW YORK,
Plaintiff in Error,

against

THE BOARD OF SUPERVISORS OF THE
COUNTY OF NEW YORK,
Defendants in Error.

POINTS AND ARGUMENT

FOR PLAINTIFF IN ERROR.

WHEELER H. PECKHAM,
Of Counsel.

New York:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU ST., COR. LIBERTY.

1868.

Supreme Court

OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* The Bank of New York,
Plaintiffs in Error.

agst.

THE BOARD OF SUPERVISORS, OF THE County of New York.
Defendants in Error.

Writ of Error to the Court of Appeals of the State of New York, from a judgment denying the application of plaintiffs in error for a peremptory writ of mandamus.

Statement of Case.

In 1863, The bank of New York paid taxes on its capital, portions of which were invested in United States securities. In 1866, the Legislature of New York passed an act, authorizing the defendants to audit and allow the amount of taxes paid by banks and insurance companies, in 1863 and 1864, on that portion of their capital invested in securities of the United States by law exempt from taxation by State authority, and to issue bonds therefor.

The relator, in pursuance thereof, presented its claims and asked to have the defendants credit and allow the amount the relators paid on the portion of its capital invested in United States notes, declared by statute a legal tender.

The defendants in error refused, on the ground that such notes were not exempt.

The relator then obtained an alternative writ of mandamus to compel such counting.

The case was put at issue by the writ return-demurrer thereto and joinder.

The Court of Appeals refused the writ and gave judgment against the relator, on the ground that the United States notes were not exempt under the Constitution, and that the statutes of Congress so declaring them exempt were unconstitutional.

POINTS.

1. Credit of United States is in all forms exempt.

2. Legal-tender notes are a form of that credit.

3. Exempt as being a *contract* of the United States.

4. The right of exemption is not confined to securities issued on a direct loan of money.

5. United States declare them exempt.

6. Exempt as financial means or instruments like old United States Bank notes.

7. Not less exempt because made a legal-tender.

8. Statute exemption constitutional.

9. Legal-tender law unconstitutional.

10. The property subject to State taxation not diminished by exempting United States securities.

11. Exemption creates no priviledged class.

12. Issue of legal-tenders though exempt really increases the taxable property of the State.

13. All principles of exemption apply especially to legal-tenders.

14. Judgment should be reversed.

Argument.

First.—The *credit* of the United States in whatever form it may be expressed, or in whatever manner it may be used, is exempt from State taxation.

In the familiar cases that have been decided by this Court on the subject, the principle upon which they were decided clearly appears to have been that, of the exemption of United States credit, and not of any particular form of United States securities.

Briefly to refer to them.

In the Weston case, the minority of the highest Court of South Carolina, (3 to 4) expressed their objections to the constitutionality of the tax in the following language —per Huger J.

1. Because a tax on the stock of the United States, *eo nomine* is a tax upon the credit of the United States.

2. Because the credit of the United States was not a subject for taxation by the States anterior to the adoption of the constitution. The credit of the United States being a result of the establishment of the Government of the United States, and the constitution has given no new power to the State Government.

3. Because the objects of taxation by the State Government are not diminished by withholding from them the power of taxing stock of the United States, as the money borrowed by the United States, is immediately by disbursements returned to the people of the different States.

4. Because it renders the General Government dependent upon the discretion of the State Governments, for one of its essential means in accomplishing the purposes for which it was established; a result at variance with one of the principal objects of the constitution, which was, to render the General Government independent of the pecuniary aid of the State Governments. See 2d Peters, 456–7.

All these propositions are clearly sound, the third not less so, in that a wrong reason is given. The money is not given back to the people in the way of disbursements. It may be disbursed, but the people give other property for it, and that property is used or destroyed. Governments collect taxes not for production, but for use and consumption. The money is converted into pork, powder, &c., which are *used*. No Government collects more taxes than it uses in current consumption. See M'Culloch on taxation, p. 399, Ed., of 1845. Hume's Essays on Public Credit, p. 296, Ed., of 1736, 1 Black. Com. 327.

Marshall, Ch. J. in giving the opinion of the Supreme Court stated the question to be "Is the stock issued for "loans made to the Government of the United States, "liable to be taxed by States and corporations," p. 465.

He then says, "Congress has power to borrow money "on the credit of the United States. The stock it issues "is *the evidence of a debt* created by the exercise of this "power. The tax in question is a tax upon the con- "tract subsisting between the Government and the in- "dividual. It bears directly upon that contract while "subsisting and in full force. The power operates upon

"the contract the instant it is framed, and must imply "right to affect that contract. If the States possess the "power to tax a contract for the loan of money, what "shall arrest *this principle in its application to every* "*other contract.*"

The learned Ch. Justice then goes on to show, in the most conclusive manner, that a tax on the stocks is a tax on the *power* to borrow money on the credit of the United States; that "the right to tax the contract to "any extent, when made, *must operate* upon the power "to borrow, before it is exercised, and have a sensible "influence on the contract" (p. 468).

When it was suggested that bonds sold were in the same position as public *lands sold*, and that if such lands were taxable bonds were, the Ch. Justice, in repudiating the inference, said: "Lands sold are in the condition of "money borrowed *and repaid.* Its liability to taxation "in any form it may then assume is not questioned. "The connection between the borrower and the lender "is dissolved. It is no burthen on loans—it is no im- "pediment to the power of borrowing that the money, "when repaid, loses its exemption from taxation. But "a tax upon debts due from the Government stands, we "think, on very different principles from a tax on lands "which the Government has sold" (p. 469). And concludes: "The tax on Government stock is thought, by "this Court, to be a tax on the power to borrow money "on the credit of the United States, and, consequently, "to be repugnant to the Constitution."

It thus appears that exemption was not given in that case because the evidence of debt was a "bond," or was stocks—but because it was a "*debt*" of the United States; because to tax them *when issued* would operate upon the *power* to borrow *before issued*—because it is a tax a *contract* made by the United States.

The exemption was given to the "*credit*" of the United States, and to the power to *borrow* on that *credit*.

Cases must be decided on *some* principle. No other principle can be extracted from the case of Weston but that of exemption of the "*credit*" of the United States; of the *power* of borrowing by the United States; and that a tax on any contract by which such borrowing is evidenced, operates on the power to borrow before the contract is made, and for that reason cannot be sustained.

In the Bank of Commerce case, 2d Black., 620, the capital of the bank was invested in "stocks, bonds and securities" of the United States, and they were held exempt on the same principle.

The doctrine of these cases is re-affirmed in the Bank Tax case, 2d Wallace, 200, and in Van Allen *vs.* The Assessors, 3d Wallace, 573.

They all rest on the broad constitutional principle that the *credit* of the United States is exempt from State taxation.

In whatever form we find that credit, the principle must be applied; whatever securities or contracts are issued upon or constitute a case of that credit, are exempt.

Second—Legal Tender notes are issued on the credit of the United States, and are an exercise of the power to borrow money on the credit of the United States, and a tax on them is a tax on the credit of the United States.

(*a*) In Metropolitan Bank *vs.* Van Dyck, 27 N. York, 400, it was expressly held that these notes were issued

"under the power to borrow money on the credit of the United States."

Head note of that case, p. 400.
See also Opinion of Davies, Ch. J., pp. 430, 433, 434, 436, 448, 462, 444, 455.
Balcom, J., p. 470. Wright, J., p. 477, 479, 480, 485. Emott, J., 491, 496, 498. Marvin, J., 525.
See also Hague *vs.* Powers, 39 Barb., 427.

(*b*) In every act of Congress in which their issue is authorized, the language used is "The Secretary of the Treasury is hereby authorized to issue *on the* CREDIT *of the United States*, &c.

Act of Feb. 25, 1862, 12 Stat. at Large, 345. Act of July 11th, 1862, 12 Stat., 532. Joint Resolutions of Jan'y 17, 1863, 12 Stat., 822. Act of March 3d, 1863, 12 Stat., 710.

(*c*) By the Constitution, Congress has the power to punish the counterfeiting of the securities and current coin of the United States. In all the acts authorizing the issue of these notes, provision is made for punishing those who counterfeit them, and in all such acts they are called securities, and not coin. If they are *securities*, they must represent the *credit* of the United States.

(*d*) Because, being notes and promises to pay, they must necessarily represent the credit of the maker; and the maker is the United States.

These notes then represent and express the credit of the United States. They are issued in exchange for *money*, and it is unquestionable that if the notes are subject to taxation, their power of purchasing money or goods by the United States would be less than if not.

The word "money," as used in the Constitution, has, undoubtedly, different meanings.

In the clause authorizing the coining of money, it means, says Mr. Justice Emott, metallic money. In that authorizing the borrowing of money, it means capital in commodities or goods.

27 New York, 491.

Thus when these notes were issued for the purchase of goods or services, it was within the meaning of that clause of the constitution, a borrowing of money.

But whether strictly a borrowing of money or not, they are none the less a use of the credit of the United States.

It is a well settled principle in the law of corporations, that if a corporation has power to contract a debt, they have power to give a promissory note for the payment thereof.

Suppose the issue of these notes not to be strictly a borrowing of money—still they were issued in order to purchase property, real or personal, or the services of men.

These things, *i. e.* property and services of men, the Government had a right to purchase and to purchase on credit.

If it is not borrowing money—it is purchasing property—and inasmuch as money, *i. e.*, metallic money is property in the the strictest sense of term, the difference between purchasing and borrowing as applied to money, is rather a distinction than a difference.

Again, Government wants money, *i. e.*, property in the shape of coin, only as individuals want it—*i. e.* for purposes of exchange.

If then the Government borrows money or what is the same buys money in credit, it does it for the purpose of forthwith spending it in the purchase of property or the services of men. The borrowing or buying of the money, then is a mere use of the medium of exchange, to facilitate its purchase of the property and services, it desires on credit. The real transaction is, that the Government has purchased certain services and property on credit.

In the case of the issue of these notes it dispensed with the borrowing of money, on certain securities, or otherwise from one set of persons, and paying it out in the purchase of the desired property or services to another, and made the desired purchases direct, and on credit giving these notes as the evidence of its indebtedness.

In the case of Dobbins agst. the Coms. of Erie Co., 16 Peters, 449, the salary of an U. S. revenue officer was held not liable to State taxation, on the express ground that its effect would be to compel Congress to pay a larger salary to its officers, and virtually would allow the States "to collect their revenue out of the revenue of the "United States." P. 448.

The promise of the Government to pay for services which it had bought on credit, was in that case held exempt from taxation.

I apprehend no distinction can be drawn between a promise to pay for services and one to pay for property.

In either case, if the promise is liable to taxation, the price charged will be higher, and the General Government will thus have to pay the tax, and the result follows that the States "collect their revenue out of the revenues of the United States."

The promise itself, then, or in other words, the credit of the Government on these purchases of property and services being exempt, these notes which are the mere evidence of that promise, must also be exempt, for to tax them would, in the words of Ch. J. Marshall, "be a tax "upon the contract subsisting between the Government "and the individual. It would bear directly upon that "contract while subsisting and in full force. The power "would operate the instant it is framed and would imply a right to affect that contract."

Third.—These notes are exempt as being a contract of the United States, and no contract of the United States can be taxed by a State.

Suppose a law passed by a State directly in terms taxing all contracts made by the United States. The power being conceded, the rate would be beyond the jurisdiction of the Judiciary, as being a political and not a judicial question.

Bank of Commerce case, 2d Black., 631.

If such contracts were taxed, one of two results must follow; either, 1st.—If the tax fell on the individual, it could be made so high as to prevent any one entering into a contract with the Government, and thus effectually stopping its operations; or, 2d.—If on the United States, the first result *might also* follow, and it *would inevitably* follow that the State would "collect its revenues out of "the revenues of the United States." Thus making the people of the whole Union support each State government and causing the United States to frame its budge to meet the possible and contingent wants of each and every State.

Political economy, however, teaches us that a tax on contracts must always fall on the purchaser or consumer, and inasmuch as government is always a consumer, and never a producer, always purchases for consumption, and never for resale, the tax would always fall on the government.

The non-taxable nature of a government contract seemed very clear to Ch. J. Marshall.

"If," said he, "if the state possess the power to tax a contract for the loan of money, what shall arrest the principle *in its application to every other contract*?"

2 Peters, 465.

If they can tax one contract why not another; andif not one, why another?

The original contract itself then, for which these notes were issued, *i. e.* the property or services of men which they purchased, was not taxable; but the notes are the evidence of the obligation in that contract, of that part of the contract promised or undertaken by the government.

That if you tax that evidence you tax the contract, is precisely what was decided in the Weston and Bank of Commerce cases, and what would seem too plain for argument.

Fourth.—That the right of exemption is not peculiar to securieties given on a direct loan of money is clear, from the history of securities confessedly exempt.

In the first loan act of Congress the stock was issued to the holders of a then existing indebtedness, most of which had been contracted in the way of purchases of property or services of men. (Act of Aug. 4, 1790, 1 Stat. at Large, 139). This was with reference to domestic creditors. In 1795, the same thing was done with reference to foreign creditors. (1 Stat. 433, sec. 2.)

The acts of Feb. 11, 1807, 2d Stat., 415, sec. 1 and 2, and of July 6th, 1812, 2d Stat., 783, sec. 1 and 2, were ot the same character.

The act of Nov. 15, 1814, 3d Stat., 145, sec. 4, authorized the Secretary of the Treasury to borrow on stock $3,000,000, and to receive in payment for said stock the Treasury notes of the government which had previously been issued for "supplies, debts, etc." (See act authorizing the issue of Treasury notes, 2d Stat. at Large, 767, sec. 4, par. 802, sec. 5; 3d do. p. 101, sec. 5 and 6, and

see list of acts authorizing issue of Treasury notes prior to 1844, in a note to page 766 of 2d U. S. Stat. Six per cent stocks were again exchanged for five per cent stocks, by act of April 20th, 1822. (3d Stat., p. 663.)

In the act of January 28, 1847, 9 Stat. at Large, p. 119, $23,000,000 of Treasury notes were authorized to be issuedin payment of debts due by the U. S. to any creditor willing to receive the same, § 4 and were authorized to be converted into six per cent. certificates of funded stock, p. 121, § 13; or the President was allowed in his discretion to borrow the $23,000,000 *directly* on the stock, § 16. Thus showing that Congress regarded the two processes as practically equivalent.

By the act of Dec. 17, 1860, 12 Stat. 121, the issue of Treasury notes to any amount less than $10,000,000 was authorized, § 1, and to be issued to public creditors who would receive the same, § 4.

In the act of June 30th, 1864, Congress authorized a loan of $400,000,000 on the commonly called 10–40 bonds, and authorized these bonds or any undisposed of 5–20 bonds to be issued for any Treasury notes, or any legal tender notes issued under any act of Congres, § 1.

The act authorizing the issue of these very legal tender notes is of the same character.

They could be issued to any creditor of the United States, and as soon as issued could be funded into United States 5–20 bonds, and the 5–20 bonds authorized by that act could be, and were issued, not only for coin but to the holders of Treasury notes issued under any former act, and also for these legal tender notes.

We thus find that there is hardly an United States loan represented by stocks or bonds which may not have been issued, and a part of which was issued for preceding and existing indebtedness.

This is true of the popular 5–20 and 10–40 loans. Yet no doubt has ever existed that the bonds and stock issued

under those loans were exempt, and without proving that the specific bonds in question were not issued for any such pre-existing indebtedness.

The stocks and bonds have been considered as evidence of a loan or borrowing *money* notwithstanding that either they or the securities which they were issued to take up, had been issued directly for property or services of men, and that no technical *money* had been ever borrowed or loaned.

We have thus seen that the original indebtedness for which these legal tenders were issued was not taxable, and we have seen that the stocks and bonds into which they are fundable are not taxable. What reason can be urged why they standing between and being the specific promises of the Government should be taxable?

Fifth.—They are declared exempt from State taxation by the United States statutes.

Were it not that in one of the opinions delivered in the Court below, the learned Justice has declared his opinion that there is no statute declaration of exemption, I should hardly regard it as necessary to argue this point; as it is, a decent respect for the opinions of that Court demands its discussion.

The acts authorizing the issue of these notes are three, February 25, 1862, July 11th, 1862, March 3d, 1863. (12 U. S. Stat., pp. 345, 532 and 710, respectively.)

They each provide for the issue of $150,000,000, total $450,000,000. In each of them these legal tender notes are called "United States notes." No other United States securities are so called.

The first provides for the issue of these notes, and in the very same section for their being funded into 5-20 bonds.

see list of acts authorizing issue of Treasury notes prior to 1844, in a note to page 766 of 2d U. S. Stat. Six per cent stocks were again exchanged for five per cent stocks, by act of April 20th, 1822. (3d Stat., p. 663.)

In the act of January 28, 1847, 9 Stat. at Large, p. 119, $23,000,000 of Treasury notes were authorized to be issuedin payment of debts due by the U. S. to any creditor willing to receive the same, § 4 and were authorized to be converted into six per cent. certificates of funded stock, p. 121, § 13; or the President was allowed in his discretion to borrow the $23,000,000 *directly* on the stock, § 16. Thus showing that Congress regarded the two processes as practically equivalent.

By the act of Dec. 17, 1860, 12 Stat. 121, the issue of Treasury notes to any amount less than $10,000,000 was authorized, § 1, and to be issued to public creditors who would receive the same, § 4.

In the act of June 30th, 1864, Congress authorized a loan of $400,000,000 on the commonly called 10–40 bonds, and authorized these bonds or any undisposed of 5–20 bonds to be issued for any Treasury notes, or any legal tender notes issued under any act of Congres, § 1.

The act authorizing the issue of these very legal tender notes is of the same character.

They could be issued to any creditor of the United States, and as soon as issued could be funded into United States 5–20 bonds, and the 5–20 bonds authorized by that act could be, and were issued, not only for coin but to the holders of Treasury notes issued under any former act, and also for these legal tender notes.

We thus find that there is hardly an United States loan represented by stocks or bonds which may not have been issued, and a part of which was issued for p eeding and existing indebtedness.

This is true of the popular 5–20 and 10–40 loans. Yet no doubt has ever existed that the bonds and stock issued

under those loans were exempt, and without proving that the specific bonds in question were not issued for any such pre-existing indebtedness.

The stocks and bonds have been considered as evidence of a loan or borrowing *money* notwithstanding that either they or the securities which they were issued to take up, had been issued directly for property or services of men, and that no technical *money* had been ever borrowed or loaned.

We have thus seen that the original indebtedness for which these legal tenders were issued was not taxable, and we have seen that the stocks and bonds into which they are fundable are not taxable. What reason can be urged why they standing between and being the specific promises of the Government should be taxable?

Fifth.—They are declared exempt from State taxation by the United States statutes.

Were it not that in one of the opinions delivered in the Court below, the learned Justice has declared his opinion that there is no statute declaration of exemption, I should hardly regard it as necessary to argue this point; as it is, a decent respect for the opinions of that Court demands its discussion.

The acts authorizing the issue of these notes are three, February 25, 1862, July 11th, 1862, March 3d, 1863. (12 U. S. Stat., pp. 345, 532 and 710, respectively.)

They each provide for the issue of $150,000,000, total $450,000,000. In each of them these legal tender notes are called "United States notes." No other United States securities are so called.

The first provides for the issue of these notes, and in the very same section for their being funded into 5-20 bonds.

The second section provides for an independent issue of 5-20 bonds, and that they may be exchanged for coin, Treasury notes or United States notes issued under that act, and in that section is found the clause, "and all stocks, bonds and other securities of the United States, &c., shall be exempt from taxation."

The act of July 11th contains a clause, "that all the "provisions of the act of February 25, that can be ap- "plied, shall apply to the notes issued under that act." (12 Stat., p. 533, § 6.

The act of March 3d, 1863, provides for the issue of three descriptions of securities. In § 1 of 10-40 bonds; in § 2 of Treasury notes, and in § 3 of United States legal tender notes, and of no others.

In § 1 we find this clause, "and all the bonds and "Treasury notes or United States notes, issued under "the provisions of this act, shall be exempt from taxation, by or under State authority."

After the learned Justice had come to the conclusion that United States notes were not declared exempt, either in the first two acts or any others, on account of the general terms used he finally concedes, "that there "may be a distinction in reference to the *small quantity* "of notes issued under the act of March, 1863." The language is more specific than in the act of February, 1862; but adds, "that it does not appear that any of the "notes in question were issued under that act." We might say that whether any of the notes were issued under that act would be a matter for the defendants in error to determine when they audited the demand after the Court had determined the principles upon which it should proceed.

It is a little singular, however, that the learned Justice should gloss over this statute by speaking of the *small amount issued under it.* The amount, in truth, being exactly the same as under the other acts, and the declaration of exemption most clear and specific.

It is most singular too that the learned Justice entirely overlooks and fails to refer to § 13 of the act of

June, 1864. The first section of that act, as he says, provides for the issue of $400,000,000 of bonds, and contains the clause: "And all bonds, Treasury notes and "other obligations of the United States shall be exempt "from taxation by, or under State or Municipal autho- "rity;" but the 13th section, which he entirely omits to notice, contains these words: "That the words 'obli- "gation or other security of the United States,' used in "that act shall be held to include and mean all bonds, "coupons, national currency, *United States notes*, Trea- "sury notes, &c., &c., which have been, or may be, "issued under any act of Congress."

Here was statutory exemption sufficiently definite, if the learned Justice had wished to see it.

But without that construction clause, it is sufficiently evident that it was intended to exempt them under the general clause in the act of February 25th, 1862.

That act authorized the issue only of notes and bonds. The exemption clause exempted "*stocks*, bonds and "other securities."

The clause, therefore, was a general one, and exempted all "stocks, bonds and other securities," whether issued under that, or any other act of Congress. It being general, the burden becomes shifted, and it devolves on the respondents to show that these notes are not included in that general exemption.

The affirmative evidence of this exemption is, however, clear.

1st. The words "other securities" naturally include them. Bouvier defines security to be "an instrument "which renders certain the performance of a contract." Webster says, "Anything given or deposited to secure "the payment of a debt or the performance of a con "tract," (Citing 3 Blackstone, 341.)

The late Judge Wright, of the Court below, calls these notes "a security," (27 N. York, 479.)

These notes are as clearly contracts as any instrument that can be drawn, be it called bond or anything else.

Other sections of the act show plainly that it was intended to embrace these notes by the term "other securities."

The 6th and 7th sections provide for punishing the forgery of any "*note*, bond, or *other security*," and in these two sections the phrase is used no less than ten times. When one speaks of notes or *other* securities, it is clear that he supposes notes to be included in the term "securities."

Again, the fact that in one act (that of 1863) where he terms used were specific, these notes were specifically exempted, precisely the same as bonds, or Treasury notes, would strongly suggest that they were included in the general terms used in the other two acts—otherwise we would have the extraordinary result that Congress, in authorizing an additional issue of these notes, of precisely the same character as the others, for the same purposes, and intended to circulate as one and the same thing with the others, yet deliberately affixed and allowed this great distinction between them—making the last decidedly the most valuable, and making an unstable and varying currency in the very effort to produce an uniform and stable one. This act, however, did more than that—it authorized the issue of notes such as were authorized by that act "in lieu of any of said notes, *or any other U. S. notes returned to the Treasury, and cancelled or destroyed.*" Thus putting notes issued under former acts upon precisely the same footing as those issued under that. (12th Stat. at Large, p. 711, § 3.)

When, however, we remember that these exemption clauses were put in the acts merely to satisfy the scruples of some who thought that the constitutional exemption was passive until declared by Congress; the intent is manifest to extend that exemption to all securities that were issued "on the credit of the United States."

Sixth.—The notes are exempt as a financial means or instrument of the Government. In McCulloch *vs.* The State of Maryland, 4 Wheaton, 316, one of the branches of the U. S. Bank had been established in the State of Maryland. The State of Maryland passed a stamp act, taxing the notes of the Bank, intended to circulate as currency—commonly called bank notes. The act was held unconstitutional, on the ground that the bank was a fiscal agent of the Government.

In Osborn *vs.* The Bank of the U. S., 9 Wheaton, 738, the tax was direct in terms on the Bank, and the same ruling was had on the same grounds.

In those cases it was held, that because the bank was a fiscal agent employed by the Government, its operations could not be taxed. Yet, the issuing of bills by the bank was an operation in which the Government had no interest; but because the bank was under obligation to render certain facilities to the Government, and the taxing its issues might prevent its rendering such facilities, such issue was held not taxable.

But, if those notes were not taxable, the present case is infinitely stronger.

A bank of issue makes money by loaning its credit in the shape of small notes. These notes circulate as currency or money, in the familiar sense of the term. So far as they circulate they displace an equivalent amount of specie, which is either used in manufacture, exported in exchange for commodities, or hoarded. The notes then being needed for circulation as money, are not presented for payment, and the banker, in the shape of interest, derives a profit from the use of his credit.

But some notes will be presented for payment; therefore, he has to keep some real money on hand to meet these demands, and he has to keep more available for sudden demands. Therefore, he needs some actual capital in his business. And on the whole he will realize but the ordinary rate of profit on the capital actually employed.

If, then, you tax his bank bills in his hands, he must charge a higher interest, in proportion to the tax, or he cannot make the ordinary rate of profit; and if you tax them in the borrowers' hands, he cannot give so high an interest and still make the ordinary rate of profits in the business for which he borrowed them.

The inevitable conclusion is that taxation of bank bills adds to the expense of carrying on the banking business.

The extinction of the late State Banks through this very kind of taxation, is an apt illustration.

There being then a profit to be derived from the business of furnishing credit-money to a community, governments have frequently assumed a monopoly thereof. I do not now speak of the policy of their so doing, but only of the fact.

In England the monopoly is leased, as it were, to the Bank of England, and the Bank pays annually for the monopoly right about £195,000 sterling, and still makes a profit of about £100,000. (See Haukey, ex-Govr. of Bank of England, on Banking, pp. 73–59, and p. 4.)

By the acts under which these notes were issued our Government has seen fit to do that business itself on its own credit, though since the passage of the National Banking Act it has partially leased the privilege, like Parliament to the Bank of England.

The only difference between Government and the bank is that the bank loans its bills, the borrower paying interest, while the Government sells or pays out its bills in payment of services or commodities, thus getting a credit without paying interest therefor. When a bank makes purchases and pays out its own bills therefor the analogy is exact.

If now a State taxes the bank bills the bank must pay the tax either directly or by accepting less interest, and if it taxes these legal tenders the Government must pay the tax either directly or by accepting less services or commodities in exchange therefor. And that the tax

may be carried to the extent of extinction is shown by the federal legislation taxing State banks.

The tax falls on the notes, and can fall nowhere else.

Is it possible then, that while the notes of the United States *Bank* were held exempt, the notes of the *United States* are liable to taxation? Liable to it, too, when excessive State taxation would make them worthless for the purpose for which they were issued?

It may be well, in this connection, to call the attention of the Court to the practical operation of these notes as a means or instrument for carrying on the fiscal operations of the Government.

When the Act of 1862 was passed Government was greatly in need of different commodities—materials of war, services of men, &c. It was anticipated that the means ordinarily resorted to to raise money, such as the issue of bonds or the old style of Treasury notes, would prove unavailing. Capitalists were unwilling to lend to the Government at reasonable rates. While however such was the fact with regard to capitalists in respect to loans, dealers in all kinds of commodities were willing to sell to the Government, on credit, in the ordinary course of business. This willingness on the part of dealers was, however, met with a practical difficulty.

To issue bonds would not enable the Government to make these purchases. A bond, or any number of them, would very infrequently equal the amount of purchases, and Government had no means of giving its creditor a convenient evidence of indebtedness, or of satisfying him of the right of its agent to purchase on its account, and at the same time not run too great a risk of fraud from the number and irresponsibility of its own agents.

To remedy this difficulty, these United States notes were issued. With them Government could go, and did go into the market and purchased commodities, and the services of men, in such amounts as it desired, and on such terms as its credit could procure, and these notes, when held by any creditor to the amount of fifty dollars, or multiple thereof, could be converted into an interest and specie-paying bond.

To increase the credit of these notes, and the inclination of people to sell for them, they were made a legal in payment of private debts.

The operation of these notes, then, as a fiscal instrument, is most plain.

It enabled the Government to dispose of its credit, in small or large parcels, for commodities, or services of men, as it was desired, funding it in the form of 5-20 bonds, as fast as they should be presented ; and it also enabled and enables the Government, by a re-issue of these notes, to repeat the same process, thus giving it the additional advantage of a loan to the amount of the notes issued, without interest.

Seventh.—The fact that these notes are by statute madea legal tender, &c., does not make them the less exempt.

The decision of the Court below, and also the argument of the defendants in error, is based entirely on the idea that because these notes are by statute made money and a legal tender, they are, therefore, taxable like so much coin.

The argument of the Court below, as expressed in the opinion of Mr. Justice Grover, is substantially as follows :

That *money* is taxable—that it is not anywhere pretended that *money* is not taxable. That these notes having been declared *money*, and so held by that Court, it is insufficient to show that they represent credit of the United States, and are *therefore* not taxable. That conceding them to have different qualities, one of which makes them exempt, and the other not exempt, the latter is controlled by the former, and they are thus taxable. That though exempt as *credit*, they are taxable as *money*, and the right of the State to tax money is superior to the right of the United States to have its credit exempt.

The argument of the Court below, as expressed in the opinion of Mr. Justice Hunt in addition to the foregoing, states the analogy between the issue of these notes and the "*issue*" of coin. It says: "These notes are *neither* "*loans to the government nor are they its instrumentalities* "*necessary for carrying on its affairs.* After they are "issued by the government * * * they are private "property with no reference to the wants or convenience "of the government."

"The government *issues* eagles, half-eagles and dol- "lars, as well as legal tender-notes, *and for the same* "*purpose.* It is *indispensible* to the carrying on of the "affairs of government that it should possess the power "to coin and to issue this money, but no one will con- "tend that it is exempt from taxation, after it has "reached the hands of individuals."

It is difficult to know how to treat an argument that thus traces an analogy between the issue of these notes and the "issue" of coin or that regards it as *indispensable* to the carrying on the affairs of government that it should possess the power to issue coin.

All our State Governments are carried on without any such power. Our government and the war of the revolution was carried on without the exercise of any such power, nor was it exercised under the present constitution till April 2d, 1792, (1st Stat. at large 246,) and for many years after a very large portion of our money in circulation was of Spanish and other foreign coinage.

Aside from that, government never has and never does "*issue*" any coin. It "coins" the metal that is brought to it, *i. e.* casts a certain quantity and quality of the metal into a certain form, impresses upon it the required stamp and hands it back to the person who brought it. It does *nothing* else (1st Brightley's Digest, 632, § 18.) So far from this power being a benefit to the government, it is, as it has been execised, a positive loss. In the early acts the mint was allowed to make no charge for coining, but gave back the coined metal

weight for weight, as received, (1st Stat. at large, 249 § 14) and it was not till 1837 that the mint was allowed to charge for such services even, as refining when the bullion brought was below standard, toughening when metals were contained in it, rendering it unfit for coinage, for copper and silver used for alloy &c., and then only enough to cover the actual expenses, (5 Stat. at large 139, § 18.)

The only reason why governments ever assumed the coining of money, is that the government stamp is regarded as the highest attainable evidence that the piece of metal is of the alleged quantity and quality. It was never regarded as an advantage to the government, but simply as a convenience to the people. (See Bouvier's Law Dict., title Money, and the various authorities there cited showing the history and purpose of coining.)

If any analogy, then, exists between the coining by the government of bullion brought to it and the issue by government of its demand promissory notes in exchange for commodities or the services of men, I fail to perceive it.

To return then to the opinion of Mr. Justice Grover. He says that "*money*" is taxable.

Now, what does the learned Justice mean by "money?" He gives no definition of it and adopts none, and yet he seems to assume that there is something in the name, that in itself makes it liable to taxation. He would seem to think that money is not credit, because he himself says that "credit is never the *object* (*subject* I suppose he means) of taxation. Nor can it be that he supposes it to be taxable merely as belonging to the general mass of property, for that would be saying simply that *property* is taxable, and not that *money* is. His argument, it it has any force, is based on the idea that *money* as *money*, and because it is *money* is taxable. That is his major premise. Then comes in his minor premise, that these notes are money, and his conclusion that they are, therefore, taxable.

Now, I contend that a more palpable piece of sophis-

try never existed; that the whole argument rests upon the merest verbiage, and that the very point which is the subject matter of discussion is *assumed* without any discussion whatever. "It may, therefore, be *assumed*," says the learned Justice, "that the State has a perfect right to tax money."

I assert that there is no such right; that it has never been asserted or conceded or exercised, and that the assumption is virtually the assumption of the whole point in controversy. But even if there were, the argument of the learned Justice is utterly unsound. It assumes that these notes are *money*, and have been declared *money* by statute. They have not been so declared. The statute declares that they shall be "LAWFUL *money and a legal tender*," &c. It is not guilty of the absurdity of declaring them to be money, if by money is meant to declare them anything else than what they are, *i. e.*, the United States promises to pay.

That the States have taxed *property* or rather *capital*, which was money, I concede; but they taxed the *capital*, not the *money*. It was the capital which was taxable, and which was none the less taxable in that, it was in the form of coined money.

That the States have never taxed anything as money, which would not have been taxable, had it not been money, cannot be disputed. The fact amounts to nothing, because never before has there been any money, that was not capital; but it is equally idle to argue from the fact, that they always have taxed money, when heretofore, money has always been capital.

The clear and incontrovertible fact is, that lawful money is *per se* neither taxable nor not taxable. Whether a thing is lawful money or not, is not a test as to whether it is taxable.

That the notes are lawful money and *therefore* taxable, I hold to be a plain *non sequitur*. It is wide of the mark for Court or counsel to show that the notes are lawful *money*. They must show that they are not *credit*. So long as they are *credit* being the *credit* of the United States, they are not taxable by the States.

Or at least the learned counsel and the Court should show, that being lawful *money* they *must be property or capital*, and that being *money* they cannot be credit.

I propose to show that *lawful money* may be either capital or credit, and that it is taxable or not taxable according as it is either capital or credit.

Lawful money is a purely *conventional* idea. I mean that there is nothing, the product of either nature or art which is *per se* lawful money.

Neither gold nor silver is lawful money. Before they become such, they must be adopted as the medium of exchange, *and* as the equivalent in which the courts assess damages and pronounce judgments.

In the earliest stages of society, trade was carried on by barter. As society advanced transactions became more numerous, and barter became more difficult. A man who had a gallon wine to dispose of, and who wanted a sack of flour could not readily find a man, who while having a sack of flour to sell wanted a gallon of wine. But in every society so advanced there has been found some one article of very general desirability. From the universality of the desire for this article, the man having the gallon of wine to dispose of, would dispose of it for that article, and with that article would obtain his sack of flour.

This article would be desirable and of exchangeable value in itself, and yet, in the vast majority of instances, it would be taken in exchange, not in order to keep or use it, but to dispose of it for something else. It would then most properly be called a medium of exchange, but it would not yet be *lawful* money. Many different articles have been selected at different times by different nations for this medium of exchange:—Iron by Sparta; silver and copper by Rome; leather at one time by the Dutch Republic and by Carthegena; tobacco by Virginia; rock salt at this day by Abyssinia; but generally at this day the civilized world has settled on silver and gold, and to a small extent, copper.

These are selected because of the universal demand for them, and of their liability to but small fluctuations

in value. Still they are not *lawful* money; an ounce of gold is no more lawful money than a bushel of wheat, and contracts with respect to gold or silver will refer to a certain bulk or quantity, notwithstanding they may be the medium of exchange.

But there will be a large number of contracts and transactions in which the medium of exchange is not mentioned. In case of difference or breach in respect to them, the judgment of any Court must be to require the specific performance of any duty that may be required by the contract.

As society advances, however, other difficulties arise. 1st. The weighing and assaying of gold or silver on each transaction become exceedingly onerous.

This difficulty is first avoided by the appearance of a class of men who will make it their business to make and sell certain pieces of the metal, of a certain quantity and quality, and with the quantity and quality certified thereon. These, if the makers are men of reputation and standing, will pass current without weighing or assaying. See 1st Macleod, Theory and Practice of Banking, p. 134, as to the old style of weighing before the invention of coinage, and for some quite curious learning as to old coins.

That step, however, is but a brief one. The advantage of having this weighing and assaying done by the State, in order to induce general confidence, soon becomes apparent.

The State then does this—receives bullion, coins it with a stamp authenticating the quantity and quality of metal in each coin, and gives to each coin a name.

2d. It will often be found impossible for parties to specifically perform the exact contract they have made, when the complainant will either be without remedy, or he must take some other and equivalent judgment.

The second difficulty is avoided by the Courts following the lead taken by the custom of trade and giving their judgments for the equivalent in the medium of exchange, instead of the article itself.

When this is done, and not until it is done do we find the full idea expressed by the word lawful money. See 2d Mill. Pol. Eco. 1 to 9; Perry, on same, 194; McCulloch on same, 129; though the subject these writers were investigating did not lead them to discuss the difference between lawful money and the medium of exchange; between bullion and coin.

Whether the Courts gradually fell into this idea of reducing their judgments to an equivalent in the medium of exchange, or it was required of them by the legislature, is a matter of no importance. The essential point is, that when they did so, and not before, was developed the complete idea of *lawful* money.

This is the more apparent if we consider for a moment the idea of *debt*: A owes B one hundred *dollars*. What is a dollar? We look to the coinage laws of the United States and we find that a dollar is a certain quantity and quality of gold, with a certain government coinage stamp upon it. That is the only *dollar there is and the only definition* of a dollar. A don't pay and is sued. The Court gives judgment that B recover $100. But suppose A owes B a bale of cotton, does not pay or deliver and is sued. The Court does not give judgment that B recover the bale of cotton; but will ascertain the exchangeable value of the cotton in *dollars* and give judgment for the dollars.

The fact, that the coin denominated a dollar, is declared by statute lawful money and a legal tender, has no effect on the dollar contract at all. The contract was to pay dollars, and the judgment is for dollars, and the only question is one of fact, viz.: What are dollars? The question or the idea of lawful money do not arise, notwithstanding that the statute has declared dollars to be money.

But when you come to the cotton debt, the judgment is still for dollars. The contract is for cotton. The judgment is for dollars. That dollars are a legal tender and lawful money does not effect the cotton contract at all as a contract. Notwithstanding they are a legal tender A can only

discharge his cotton debt by a tender of *cotton*. He cannot discharge it by a tender of dollars though they are lawful money.

It is only when we come to assess damages on the cotton debt, and to give judgment in dollars instead of in cotton, that we get the idea of lawful money.

Suppose the coinage statutes of the United Stated did nothing but prescribe the weight and fineness of the several coins and give them a name—saying nothing about lawful money or a legal tender. It is evident that unless they had two different coins by the same name, those coins would be quite as much lawful money and a legal tender as they now are, provided only that the courts should assess on them the damages for breach of other contracts, and should specifically enforce contracts for them.

Declaring coins, then, to be lawful money, etc., is positively of no effect, except as it may be construed by the courts to require them to assess damages in such money.

Those words may, however, have this further effect: If, after the making of any contract, new coins are made of less value, but bearing the same denomination, and it is desired to make these coins receivable in discharge of the old contracts, making them lawful money and a legal tender, will have that effect. It is evident, however, that such a law will only affect contracts for money in the old coins by name. If the contracts are for anything else, *e. g.* cotton, and there is a breach, the courts will assess the damage according to the relative value of the cotton and the new coin.

The word "lawful' in the statute is important and effective.

The word "money" itself, is an exceedingly vague term. Webster gives it these definitions: 1st. Coin—stamped metal, etc.; 2d. Bank notes or bills of credit; 3d. Wealth or affluence. Bouvier gives two—Coin and bank notes. Blackstone calls it "a universal medium. "The common standard, by a comparison with which "the value of all merchandise may be ascertained.

It is from this evident that certain forms of both capital and credit might be denominated money and properly so denominated and yet not be *lawful* money.

For instance, in the definition of Blackstone, it is evident that the precious metals and not the coins, are the matter referred to, for they can only be called a universal medium. Foreign coins, too, though technically money, *i. e.*, lawful money in their own country, are in others mere bullion, and yet are popularly called money. So that as between countries not having a common coinage, the "medium" and the "common standard" is the metal, and not the coin. (Mill, in his 2d vol. Polit. Economy, 169; Perry on same, 191; McCulloch on same, 129, when speaking of money, are all evidently referring merely to the precious metals.

When we refer to the money reserves of the Banks of England and France, required by their respective laws, we mean the bullion reserve, and those laws are satisfied by the reserve of uncoined ingots.

The term money is popularly and properly applied to this form of capital, but it is evident that such capital is not money in its strict sense; not lawful money.

To refer now to credit. The old State bank bills were popularly called money; so also the paper issues of the late rebel government, so the old Bank of England notes, and these very legal tender notes had there been no legal tender clause in the act would equally have popularly been called money. (See 3d Revised Statutes of New York, 5th ed., p. 645, § 19.)

1 Vesey, 271; 1 John. Ch., 231.
9 Barb., 35; 11 Barb., 345.

That the bank notes, however, though called money, were not *lawful* money, all will concede. The late legislation with respect to the Bank of England notes is an apt illustration. They have always been *called* money. By late legislation, however, they have been made *lawful* money and a legal tender, &c. Prior to such legislation the notes were money, but not *lawful* money. Now what possible effect did that legislation have on those notes except to make them the equivalent in which the Courts assessed damages?

The same result was obtained in the suspension of 1797 without *declaring* them lawful money or a legal tender by simply providing for a stay of proceedings in all cases when Bank of England notes had been tendered. Thus making them the equivalent in which the Courts assessed damages and making them nothing else.

Having then found the peculiar meaning attached to the phrase "*lawful money* and a legal tender," the next question is, Is credit capable of being so used?

That it is so capable—that it has been and is now constantly so used, is perfectly apparent.

Without being made a legal tender, credit is constantly and largely employed as a substitute for money. Book accounts, bills of exchange, checks, all act as substitutes in effecting exchanges. In the form of checks credit effects the whole amount of the London Bank Exchanges without a single coin or bank note being passed. The amount of these exchanges in 1857, was £1,900,000,000. (Hankey's Lecture on Banking, p. 64.)

But in the form of demand promissory notes credit is commonly employed as a substitute for money. Of such notes Mr. Mill, vol. 2d, p. 46, says: "They perform all "the functions of currency, and render an equivalent "amount of money which was previously in circulation "unnecessary." Further he says: "The conveniences "of this mode of, as it were, COINING CREDIT having "been once discovered, *governments* have availed themselves of the same expedient, and have issued their own

"promissory notes in payment of their expenses; a re-
"source the more useful because it is the only mode in
"which they are able to BORROW MONEY without paying
"interest; their promises to pay on demand being, in the
"estimation of the holders, equivalent to money in
"hand."

McCulloch says, p. 135: "A banker who issue notes,
"*coins as it were his credit.*"

Now credit at this stage and in this shape bears precisely the same relation to lawful money that gold or silver bullion does.

Neither is "lawful money," because the Courts will not regard them as the equivalent in which to assess damages and render judgments, and for that reason only.

When, however, Government makes this credit a substitute for money, the medium in which the Courts assess damages, it becomes "*lawful* money."

What was before *money* only in the general and familiar sense, becomes now "*lawful* money." It was credit money before—it is credit money now, but it was not *lawful money* before—it is *lawful money* now. (See Perry's Political Economy, pp. 254–5.)

Though declared to be money the nature of the notes is still "not altered; they are a form of credit." (Perry, p. 326.) The illustrations of "*credit*" thus made money, are too familiar to need reference.

It has been done by pretty much every European nation, though I believe China is entitled to whatever reputation attaches to its first invention.

See Wolowski Essay on Paper Money, p.

Credit then, as we have seen, having the capacity to be made lawful money, what result follows from the fact that Congress has made it so; and what was the object of Congress in so declaring it?

It is certain that they did not mean to enact that the notes *were* coin.—they did not mean by the magic of their own laws, to *change* the notes into coin.

Their object was to sustain the credit, or, in other words, add to the purchasing power of the notes. Congress supposed that under the then existing circumstances, they could not fulfill their contract to pay on demand, or, in other words, could not snstain the convertibility of the no e, and knowing that its purchasing power, or, in other words, its credit, would then decline, they attempted to sustain that credit by making them lawful money.

Now if these notes were not declared to be *lawful* money they would be exempt from taxation.

That is conceded so far as this branch of the argument is concerned.

Whether making them lawful money adds to their credit or purchasing power is at least doubtful.

See 2d Mill, 74, Perry, 262.

But exempting them from taxation does unquestionably, even in the opinion of the Court below, add to their credit or purchasing power ; and the exemption is *constitutional.*

According to the opinion of the Court below then, this singular result follows :

That Congress, in the endeavor to add to the credit of the notes, sacrificed the strong and certain element of non taxation for the weak and uncertain one of being made lawful money.

The argument of the Court below is to the effect, that being lawful money is inconsistent with exemption—because money is taxable. Our argument is, that there is no such principle as that money, because it is money is taxable. That money in its popular sense is taxable or not, as it happens to be capital or credit. That these notes without being made lawful money would still in the popular sense be money, credit money, and being the credit of the United States, not taxable, and that making them *lawful* money still leaves them credit money, and being the credit money of the United States, not taxable.

These notes then being the credit of the United States, and being the evidence of a contract of the United States, and being a fiscal instrument of the United States, are exempt and declaring them to be lawful money, does not take away that exemption.

But, even granting all its premises, the argument of the Court below amounts to this: "These notes are money; they are credit, and not taxable. It devolves on us to show that they possess no quality rendering them subject to taxation. Not showing that they are not money, we fail to show them not taxable, because the *quality* of money is stronger to make them taxable than the 'quality' of credit to make them not taxable."

It is only necessary to say that this making the exemption of credit *subject* to the taxable quality of money is in direct opposition to the clause of the constitution, which provides that "this constitution and the "laws which shall be made in pursuance thereof, shall "be the supreme law of the land." Cons. Art. 6, Sub. 2.

The *supreme* law says that the credit of the United States is exempt; the Court below says it is not exempt, because it is *money*, and the *State law* taxes money. The Court below makes the State law supreme, in which differs with the constitution.

Eighth.—The statute declaring these notes exempt, is constitutional.

It is a little singular that the Court below should have held the clause of this act, which declares these notes to be 'lawful money,' to be constitutional *on the ground*, that it aided the Government to borrow money, 27 New York, 400; and should, in this case while conceding, that the exemption clause was inserted for the same purpose, and that such "exemption will enable the Gov-"ernment to borrow money on more favorable terms,"

(per Grover, J.), yet hold the exemption clause unconstitutional. It was dubtful, whether the lawful money clause had that effect. No one doubts that the exemption clause has that effect. Yet they hold the one clause constitutional, *because* it aids, and the other unconstitutional *tho'* it aids and concedes that both were enacted for the *purpose of aiding* and for no other purpose.

It must follow that if the legal tender case was rightly decided, this was wrongly decided. Tho' the converse would not necessarily be true, because the question in the legal tender case was whether the lawfu money clause had the effect of aiding the Government to borrow money.

Referring, however, only to this case, we find the argument of the Court to be this.

That these notes are property in the hands of a citizen. That the State can tax any property in the hands of its citizen. That no act of Congress can deprive it of that right. That the constitutional right to borrow money would prevent a discriminating tax on United States securities, but not an impartial one. That an impartial or equal tax has no tendency to embarrass the Government as would a discriminating tax.

Mr. Justice Grover, indeed concedes, that "exemption from taxation by the State will enable the Government to borrow money, upon more favorable terms," but contends that prohibiting competition by other borrowers, exempting all products and commodities which the general government may require or use, and all capital employed in such production would have the same effect, and as no one would claim the constitutionality of laws of that kind, so the exemption of the first cannot be claimed on that ground.

These arguments are not new. They were presented and pressed in all the old tax cases. The Court below concedes that a discriminating state tax would be unconstitutional, but contends for the right to lay an impartial one.

In the Bank of Commerce Case, 2d Black, 621, this Court directly says, that if the right of the State to tax at all is admitted the *rate* is a *political*, and not a judicial question.

And so long ago as the Weston case, Ch. J. Marshall showed the distinction between the taxation of government debts and property sold to or by the government. 2d Peters, 468–469.

As I have before remarked the statutory exemption was declared in order to obviate the possible objection that the constitutional exemption was dormant until so declared; and the objections urged to its constitutionalty in the Court below, go to the exemption of any loans to a so-called impartial taxation, and not to anything peculiar in this statute.

Ninth.—The legal tender clause is unconstitutional. Consequently these notes are not "lawful money" or any money, unless in the popular sense in which the old United States bank notes were called money.

If they are not "lawful money" the whole argument of the learned counsel and of the Court below, that they cannot be exempt, *because* they are money, falls to the ground

For my views on this point I would refer the Court to a pamphlet herewith submitted, reviewing the decision of the New York Court of Appeals, as to the constitutionalty of this clause. I would only in addition call the attention of the Court to one or two points. In that pamphlet I give a definition of money, p. 19, § 23, to wit: "That it is a piece of certain quantity and quality of an article of exchangeable value," &c., and proceed to show that these notes are not articles of exchangeable value, but on the contrary are mere credit. That the constitntion has no wbere given to Congress the power to make its credit

the currency of the country, or to make its credit money, and consequently that these notes cannot be money.

But in the present argument I have assumed and argued that credit can be money.

It is probably unnecessary to point out the distinction, that in the review the question was, whether Congress had power, *under the Constitution*, to make credit money.

In the present argument I have assumed, as I had to for the argument, that it had the same power to make credit money that other governments have, and I have shown the effect of the exercise of that power to be, not to change the qualities or relations of either credit or capital but simply to affect existing contracts.

Tenth—In holding these notes exempt from taxation no property is removed from the taxing power of the state. The property of the country subject to taxation is not lessened. The state is not deprived of the power to tax anything or any property.

This point, I know, is directly opposed to the whole assumption of the Court below, and of the argument of counsel for the eefendant in error.

Both *assume* that *property* is withheld from state taxation; that the States have less to tax than they would have had, had the notes not been issued and been exempt.

When I pressed upon the Court below the argument that the notes were but credit, and that credit was not the subject of taxation—could pay no tax, was not an element of production except in so far as it facilitated exchanges, the Court, or at least Mr. Justice Grover conceded that credit could not be taxed. "Credit," says he, "is never the object" (subject) "of taxation; but property is."

But the learned justice argued that the tax "is not a "tax upon the credit of the government, but on the "property of the citizen, which consists of a debt due "from the government."

On this subject, I desire to call the attention of the Court to a few principles which seem to me almost too clear for argument.

Taxation is employed by government for appropriating to itself a certain portion of the property and of the personal services of the community. The government needs lands, ships, powder, guns, provisions, etc. It also needs the services of men, as civil and military officers, soldiers, etc. It needs money only as the business man needs it, *i. e.*, as an instrument of exchange, as a thing in exchange for which it is sure of being able to procure the property or services it needs. It collects its taxes in money and not in these very services and property, simply because of the greater convenience, and for the same reason that the merchant sells for money and not for the thing which he really desires, and which, with the money, he eventually buys. in exchange.

These taxes too, must be paid out of profits—not profits as distinguished from wages or interest, but profits as meaning the increase of wealth derived by the community from the use of its labor and pre-existing capital.

This is evident, because if the whole results of a man's labor and use of capital are taken from him by government, he will not work or use his capital.

The moment the taxes become so large as to absorb all, or even the greater portion of the profits of the community, the evils of the government will more than counterbalance its good, and it will be overthrown.

Now CREDIT is not a subject of taxation. It is not for the simple reason that it is neither commodities nor the services of men. It is neither labor nor the result of labor, capital. It is not an element in production. This is so conclusively shown by McCulloch, in his Political Economy, pp. 123 to 128—by Ricardo, in his Evidence before the House of Lords, cited by McCulloch—by Hume, in his Essay on Credit—by Mill, in his Political Economy, Vol. 2, p. 35—by Mr. Hankey, late Governor of the Bank of England and still one of its directors—

Lecture on Banking, pp. 45 to 48, that it is only necessary to refer the Court to their demonstration of it. "All," says McCulloch, "that the highest degree of "credit or confidence can do is merely to change the "distribution of capital—to transfer it from one class to "another."

Let us analyse it a little further with respect to taxation.

Say A has a capital of $1,000, he uses it in business and realises a profit of $150. Now of that profit a portion is due to the use of the capital and a portion to the labor of A. Neither alone could have produced the profit. This profit then is the source from which taxes can be paid, and *there is no other*—because, if more than or even the whole of the $150 were taken by tax A would abandon his business, and A being but a type of the whole community, either a revolution would take place or the people would become the mere slaves of the Government.

Suppose, however, B owns the capital and A does the business. A has to borrow the capital of B. The profits now have to be divided. B must have the share belonging to his capital, and A that belonging to his labor.

This division will be made according to the existing relation between labor and capital in the country where the business is carried on. The proportion would vary, too, with the security of the capital. In ordinary language the proportion given to the lender is called interest, that to the borrower profits.

Suppose, in this case, the rate of interest to be seven per cent., B would then get $70, A $80.

Is it not evident, that tax where you will, B's interest of $70, or A's profit of $80, the fund of $150 is the only source from which the tax can be made; that the only effect of the tax, from whichever collected, is that the amount of the tax, say $10, is taken from the $150, leaving the balance to be divided between A and B.

Suppose, in the first case, where A used his own capital, that the rate of taxation was as high as the business would

stand and yet yield a profit, and that he was taxed on his $1,000 capital one per cent., $10, making his profit $140. Applying 7 per cent; $70 for interest on his capital, leaues him a net profit of $70.

Suppose, in the second case, when A *borrows* of B the capital he uses, A is also taxed on that capital $10. Suppose, then, that B is also taxed on the $1,000 A owes him. Is it not clear that the tax is doubled, and that $20, instead of $10 must be taken from the $150 00.

If seven per cent is the ordinary market rate of interest, B will still take $70 and the tax *i. e.* $80, so as to make his $70 net; A will thus have but $70 left. Out of this he must pay his own tax of $10, thus leaving his net profit but $60, $10 less than in the first case, and precisely the amount of B's tax.

The effect, then, of taxing B on the $1,000 A owes him is precisely the same as if you had taxed A 20 per cent, instead of 10 per cent. The tax has to be paid out of the profits of A's business, and if none are made, out of the principal sum of $1,000. There is no other fund —no other possible way of collecting it.

If the $20 per cent., as levied on A & B is so high that the business cannot pay it and yield a profit, the business will be abandoned. If there be a usury law so framed that B. cannot take his 7 per cent. and the tax without breaking the law, one of three things will happen: Either 1st. The usury law will be disregarded, and B will take his 7 per cent.. and the tax, and a little more for the risk; or, 2d: The tax law on B will not be enforced, but will become practically obsolete; or, 3d.: B will refuse to loan, and will invest his capital in some other manner.

As a matter of fact, each of these alternatives is somewhat pursued in the State of New York, and probably in all places where laws taxing credits prevail.

The New York usury law is practically a dead letter. The plea is socially a disgrace and is legally most difficult to sustain.

The tax laws on credits are about half obsolete. Of the immense sums loaned on bond and mortgage and

other securities, it is very rare that on any of them the lender pays a tax. If they did the net interest received on the present rate of taxation would be but some 4 per cent. Were that really so, every resident in New York knows that not a dollar could be obtained on loan.

Again, the risk of being taxed at present is sufficiently great to deter many persons from lending in such manner as to incur the risk—one of the consequences of which has been the great popularity of United States non taxable securities.

A tax on credits thus becomes nothing more or less than a tax on interest, and as interest is nothing but the share of profits apportioned to the capitalist, it is evident that a tax on interest is a tax on profits and must fall on the borrower.

If you tax B for the security of A, B holds for the $1,000 loan you diminish by precisely the amount of the tax on B; the ability of A to pay any tax, *i. e*, it is the same as if you *had* taxed A, because it ultimately falls on A.

In other words, when B loans A the $1,000 capital and A uses it and makes say $150 from its use, and pays B interest out of it, you can tax B and A together, in respect to that transaction, precisely the same sum and not a fraction more than you can tax A alone, where he owns his capital and is not a borrower.

On this subject, Mr. Mill, when showing that taxes on the sale of land must fall on the vendor, says: "It has "been objected that this argument would not apply if "all modes of permanent investment such as the pur- "chase of Government securities, shares in jotnt stock "companies, mortgages, and the like, were subject to "the same tax. But, even then, if paid by the buyer, "(*i. e.*, lender,) it would be *equivalent to a tax on in-* "*terest;* if sufficiently heavy to be of any importance, "it would disturb the *established relation between inter-*

"*est and profit;* and the disturbance would redress it-
"self *by a rise in the rate of interest* and a *fall of the*
"*price of land and of all securities.*"

Again, take a whole community and suppose each man to own an equal amount of and use his own capital, and that no one owes anything, that community could pay a certain tax. Suppose then, half of them loaned their capital to the rest, taking securities therefor, and that the gross profits were the same in both cases.

It is clear that only the same tax could be paid in each case. But in the latter case, if the securities are counted the wealth of the community would be increased 50 per cent., because the borrowers would have the whole capital and the lenders would have securities for half.

It is plain that here the sole function of the securities is the distribution of capital, not the production, and that after the loan is made and the securities executed, the community is not a particle richer than before. Or, to bring the latter matter to a unit illustration. A owns a horse and sells it to B on credit, taking B's note; B is now taxed for the horse and A for the note; before the sale A only was taxed for the horse. By the simple expedient of a sale on credit, the taxable value of this horse is doubled; and yet it is plain that between A and B there is no more property than there was before; A and B together have no ability to pay a larger tax in respect to this property than A alone had before the sale, and there is no equity in that property being taxed any more after the sale to B than when A owned it; yet B has to pay double the tax A did, because he buys on credit. He pays it either in the rate of interest or in the increased principal of the note he gives.

There is no reason why the principle here illustrated should not always be observed in laying taxes, *i. e.*, why all taxes should not, in the first instance, be levied exclusively on property, real and personal, or mixed, and not at all on *choses in action*, which all credits are. If they were, the rate of taxation on unencumbered property, or of a man who owed nothing would be somewhat in-

creased, while in the case of encumbered property, or of an indebted man, his rate would be lessened by precisely the amount which he had to pay his creditor in the shape of interest, to remunerate the creditor for the tax paid by him on the security or indebtedness.

Under either system, the tax falls in the same place *i. e.*, on the property of the country. You may collect it *first* from the creditors, but the creditor no more pays it than does the importer the Custom duties. He carries it right over to the borrower. It affects the lender only just so much as it diminishes the sum to be divided as interest and profits, between him and the borrower, and it would affect him just so much had it been levied on the borrower.

But the question is not whether, *practically*, it is better to collect the tax wholly from the borrower, or wholly from the lender, or partly from each. I only claim that only a certain tax can be collected from a certain amount of property, and that you can collect no more when the property is loaned than when it is not.

One more illustration: Suppose the tax so large as to take *all* the property of a community; would the securities count anything?

I conclude, then, that credit is not the subject of taxation, and can pay no tax.

Thus far, of the effect of so called taxing the credit of individuals.

When we come to consider the effect of taxing Government credit, another element is introduced.

All taxation of credit, must, as we have seen be paid by the producer, but governments are not producers; instead of producing, they tax. Taxation is to a government however, the same as production. It is the right to take a portion of the production of the citizens it governs.

Taxing the credit of government is like any other taxation of credit, except that we are relieved from the complicating element of a usury law. The tax must be paid by the borrower. In order to pay the tax then, the government as it cannot produce must *tax*.

We have thus the ridiculous performance of the Government taxing itself, and then taking the people to pay the tax of itself. Certainly nothing is gained in that operation. The real effect, however, is much worse. If government sells its securities free from tax it gets so much more for them. If it sells them subject to tax it gets so much less for them. And this deficiency it must raise by tax. Now as a tax always takes more from the people than it gives to the government, by at least the expense of collecting; this expense of collecting becomes a *dead loss.* This loss would be saved by simply in the first instance, exempting the credit from taxation, and thus receiving it as part of the loan.

In the English system of taxation, this loss as respects the income tax at least, is saved by another method, *i. e.*, when the interest on the public securities is paid by the Bank of Eangland, the bank retains in each case the amount of the income tax. Hankey on Banking, p. 79. Our general government does the same thing when it deducts from the salaries of it own officers their income tax on the salary. In these cases it is clear that the only affect of the tax is in the one case, a reduction of interest, and in the other of the salary.

That is the effect when a government taxes its own securities. But when another government taxes them, *i. e.*, as in the case at bar; the State Governments tax the securities of the general government, or *vice varsa*, the case is somewhat altered. Supposing the general government to be the borrower. If it borrowed by selling securities of a certain and fixed tenor, it will realise so much less on their sale, as is the amount of the State tax, to which they will be subject. This deficiency in amount, the general government must raise by tax, so that the effect of it is precisely the same, as in the taxation of the salary of the United States officers, in the Dobbin case, that it would "give the States a revenue out of the revenue of the United States," 14 Peters 448.

This appears still more plainly if we suppose the United States, instad of offering for sale a security of

a fixed tenor, to come into the market for a definite certain sum, arranging the terms of the loan by an alteration of the nominal rate of interest.

Supposing that free from State taxation, it could borrow at six per cent.—subject to it, it would have to pay say seven.

The general government would have to levy a tax equal to seven per cent. on its loans instead of six, in order to pay its interest, and the lender would then have to pay one per cent. of it right over on the State tax.

And the effect of a sale of securities of a fixed tenor is the same. It is matter of indifference to a borrower whether he borrows a certain sum by the sale of *six per cent.* bonds at say 86, or of *seven per cent.* bonds at par, or *eight per cent.* bonds at, say, $115. (It requires fractions to state the exact proportions.)

In either case a higher interest is paid than if the security were not taxed by the State, and that additional interest the Untted States must collect by tax and pay to the lender who pays it to the State.

Can anything be clearer than that the general government is collecting revenue for the State?

It is even worse than this. It costs the State to get this additional interest paid by the general government to the lender, the expense of collecting from the lender; so that the general government pays so much more than the State receives, as is the difference between the one per cent. collected by the State from the lender and the net sum received by the State from its collecting officers. This may be large or small; but it is certain that if State taxation of general government securities is allowed, it will be far more economical to levy the tax directly on the general government, which really pays it, than indirectly through the creditors of the general government who merely collect it and pay it over to the tax officers of the State.

This result is inevitable in every form of taxation—a tax on securities is always equivalent to a tax on interest, and a tax on interest always falls on the borrower.

If you tax an existing security you lower its price—if one to be made, you lower its price or increase the nominal rate of interest.

But, says Mr. Justice Grover, while conceding that credit is never the object [subject] of taxation. "The "tax is not a tax *upon the credit of the government—the* "*tax is imposed on the property of the citizen which con-* "*sists of a debt due from the government.*

According to the learned Justice, then the creditor lends his property, a ship, to the government, and takes back the government bond—the government has the property loaned, and as (says the learned Justice) this bond is property in the hands of the citizen—the creditor also still has the property. Thus by the simple expe pedient of a sale on credit this property is doubled. The creditor is still taxed for the ship, just as if he had it and could use it productively. The State cannot tax the general government directly for the ship; but is it not evident that it does so indirectly, when it taxes the creditor for property which he has not got, and cannot use productively, but for which he holds the government promise—will he not make the general government pay him the amount of such tax until it returns the ship or equivalent property, which he can again use productively.

Put it a case of individuals—A sells B a ship and takes his note—B is taxed for the ship, A for the note—before A only was taxed for the ship. Is there any more property after than before the sale? When A has a ship worth $1,000 and sells it to B on credit, have both of them got property worth $1,000?

The learned Justice says, credit is not the subject of taxation. But was it ever attempted to tax credit in any other manner than by the levy of a tax on the creditor or promisee? And if such a tax has the same effect, as has been shown, as if it had been directly levied on the borrower, can that be done indirectly which cannot be done directly?

The great and apparent error of the Court below and

in the argument of counsel, is in calling these bonds or notes "property." They are not property—either real, personal or mixed—they are choses in action—nothing more or less.

You might burn up every bond and note there is in the country, and except for the paper and the expense of printing not a particle of property would be destroyed. Burn up a single ship and so much property *is destroyed* Choses in action, bonds, notes, or anything else are but evidences of the right one man has to have property held by another transferred to the holder of the chose in action. If the debtor has no property of what value is the chose in action?

The bond or note is not *property* in the hands of the citizen. It represents property in the hands, or to be in the hands of the Government. When paid, the creditor gets property, before that he has the *right* to property but no property.

The necessary result of all this is, that in the exemption of legal tenders or other Government securities no property is removed from the sphere of State taxation.

In the words of Huger, J., in the Weston case, in the State Court, "the objects (subjects) of taxation by the "State Government are not diminished by withholding "from them the power of taxing the United States stock, "as the money borrowed is immediately, by disburse-"ments, returned to the people of the several States." 2d Peters, 457.

The conclusion of the learned Justice is sound, but his reasoning not quite correct.

The mere money, *i. e.*, medium of exchange, is of course returned, but it is returned in the way of purchases of commodities or services of men; and the effect is precisely the same as if the Nation had been taxed those commodities or services. Those commodities and services are used up and consumed, and not being used or consumed productively are of course forever lost to the Country. It is the expense of government; if the money came bauk to the people, government would cost nothing.

The money, *i. e.*, the commodities that are borrowed, are *used up, consumed.* The State cannot tax it, because so long as it still remains in the hands of the General Government it is not taxable, and so soon as used or consumed by the General Government, of course it is not taxable, for it does not exist. All the money, *i. e.*, wealth or commodities, that is borrowed by the General Government does diminish the subjects of State taxation, it makes the taxable property so much less than before. And this result is precisely the same whether the money is taken by the General Government, by borrowing or by taxation. So much property is actually removed from the possession of and from productive use by the individuals of the community, and is given to the General Government to use and consume, *i. e.*, destroy. It is clear enough that there is less property for the State to tax than before. By no possibility can that result be avoided; borrowing, instead of taxing, only affects the question from what persons the property is taken, and the rule of distribution of future production. No government ever fired a pound of powder it did not have, or eat a pound of pork not already killed. There is no such thing as borrowing from the future; everything that is borrowed exists.

The subjects then of State taxation are diminished, because some of them are taken and used by the General Government.

The operation of borrowing having gone so far, *i. e.*, the thing being borrowed and used or consumed, the General Government issues its bonds for repayment. How will it get the means of paying those bonds? why by taxing, *i. e.*, taking from the people, as a whole, just the amount of money or property necessary to pay to the holders the amount of the bonds.

The bonds, then, represent property still in the hands of the citizens, and *to be taken* from them by taxation, and *to be paid* to the holders of the securities. They don't represent the property borrowed, for that has been used up or consumed, or is in process of consumption, and

will therefore never be applied to the payment of the securities. They represent property in the hands of the whole community, which is to be applied, through taxation, to the payment of these securities.

While the securities are unpaid, and the *property*, which must pay them, is in the hands of the citizens, it is subject to State taxation; when that property has been applied to the payment of the securities and is in the hands of the former holders of the securities, it is again subject to State taxation.

The taxable property of the State is not diminished by the exemption of the United States securities, because should those securities be absolutely destroyed or absolutely repudiated, there would not be a particle less taxable property in the country than before. The only effect would be that the country, as a whole, would not have to transfer part of their property to certain of its citizens, the Government acting as the agent to collect the property or money under the name of taxes, and pay it under the name of interest or re-payment of loans.

On the theory of the Court below, the citizens of the State can lend their property to the General Government (thus of course by so much diminishing the property in the State), and still *not* diminish that property by the expedient of taking bank securities, notwithstanding that those very securities must be paid out of and represent the property that is left.

If the theory were true, no apprehension need ever be felt as to the increase of federal indebtedness, for if the security is property, the people, when taking it for their property, make a simple exchange, and the property of the community is not diminished, notwithstanding that the whole amount has been consumed and destroyed by the Government.

Taxing securities then, and also taxing the property in the hands of the citizens which is to be applied to their payment, and which the securities represent, is like taxing A and B in the illustration hereinbefore used. It simply increases the tax on A, or on the property. It is

a tax by the States on the general government, and then a tax by the general government to pay, and a dead loss of the expense of collection.

To say that the general government can borrow commodities or the services of men *and consume them*, and then tax the promisers as if the lender still had property, is in the words of McLeod to say that "one can buy commodities and also have the money as well," or "that a nation can spend its money in destroying its enemies and have it too as bank notes." McLeod Theory, &c., of Banking, vol. 2d, pp. 339, 386; or in more homely phrase, "that a man can eat his cake and have it."

Eleventh.—Exemption creates no privileged class.

Taxing securities, as we have shown, is a tax on interest, and the effect is a rise in the rate of interest, evidenced by a fall in the price of securities. If government securities are exempt from taxation that is an element in the price they bring. That is scarcely a privilege which is open to any one who will pay for it.

If they were taxed or subject to taxation, the lender would, as we have seen, charge higher interest and make the government pay the tax. The lender is always exempt.

Admit these securities to-day to be taxable, and what would result. Their price would fall. The present holders of existing securities would lose. If they sold them it would have to be at such a price that the vendee would be exempt from taxation in that he would collect from general government the amount necessary to pay it.

The only choice government has, is, whether by making the securities subject to tax it will impose upon the people the additional burden of the expense of collecting the tax.

Twelfth.—Exemption of legal tender notes, or any other notes designed to and actually circulating a currency, not only does not diminish the taxable property of a State, but their issue, though exempt may really *practically* increase it. The property given in exchange for the notes being, as we have seen, consumed by the general government, of course the taxable property is diminished by that amount.

Of the property left and represented by the notes, a considerable portion will be in coined money. The notes circulating as money will displace that coined money, and it will be melted and used as a commodity, or sent abroad to purchase other commodities Now as the coined money, when in the country, is held in small sums by numerous individuals, and is of a nature easily to escape the notice of the tax assessors, and as the property purchased by it is generally much more easily discovered and assessed, the *practical* result will probably be a larger assessment roll to the State. Theoretically (and actually, if all property were reached by the assessors,) it would make no difference, whether the people held the coined money, as their property, (provided they in some way used it productively), or exchanged it for commodities—whichever they kept would be the property represented by the notes, and out of which, if paid, they must be paid.

Thirteenth.—All principles of exemption apply especially to legal tenders. As to all other securities now issued, their exemption is immaterial to the Government, because the transaction is past, and the loss would, as to them, fall on the present holder, who had paid for them a price proportionate to the exemption. Its effect would be on the credit of the Government in all future transactions.

As to securities now issued it might even be an advantage, for the Government could buy them in cheaply.

With legal tenders it is different; they are *credit* money; they are paid to the Government, and again paid out. Taxation lessens their purchasing power, or, in other words, lowers their price; therefore when the Government attempts with them to purchase commodities or the services of men, it cannot get as much as it otherwise would. The effect is the same as if the Government were constantly negotiating a new loan. This deficiency it must make up by increasing its rate of taxation.

There is, in fact, no security for the exemption of which the argument is so strong as for the legal tender note.

Fourteenth.—The judgment should be reversed, and the case remanded to the State Court, with instructions to issue the peremptory writ prayed for.

WHEELER H. PECKHAM,
Of Counsel for Plff. in Error.

Supreme Court

OF THE UNITED STATES.

DECEMBER TERM, 1868.

No. 247.

THE PEOPLE OF THE STATE OF NEW YORK,

EX. REL.

THE BANK OF NEW YORK,

Plaintiffs in Error,

agst.

THE BOARD OF SUPERVISORS OF THE COUNTY OF NEW YORK,

Defendants in Error

BRIEF AND POINTS FOR THE DEFENDANTS IN ERROR.

CH. O'CONOR,

RICHARD O'GORMAN,

Of Counsel for Defendants in Error.

NEW YORK:
W. C. ROGERS & CO., PRINTERS AND STATIONERS,
No. 26 JOHN STREET.
1868.

U. S. Supreme Court.

SUPREME COURT OF THE UNITED STATES—
DECEMBER TERM, 1868.

No. 247.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE BANK OF NEW YORK,
Plaintiffs in Error,
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY OF NEW YORK,
Defendants in Error.

Brief for the Defendants in Error.

STATEMENT OF FACTS.

On April 5, 1866, the Legislature of New York passed an act to provide for refunding to various banks and insurance companies in the city of New York the taxes of the years 1863 and 1864, "imposed and paid or collected upon that portion

of their capital invested in securities of the United States by law exempt from taxation."

Laws N. Y. 1866, vol. 2, p. 1996, § 1.

This State act directs county bonds "to be issued to any bank, &c., which may have paid taxes in said county [of New York,] for the years 1863, or 1864, or which may hereafter pay taxes levied in said years upon any portion of their capital stock invested in certain securities of the United States by law exempt from taxation." Directions are given in this act that "The Board of Supervisors of the County of New York," the now defendants, ascertain and audit the amounts so paid by the banks; and refunding bonds are ordered to be issued for the amounts so paid "together with the amount claimed for costs, charges, and interest."

The plaintiff in error being a bank created under the laws of New York and having paid taxes in the said years 1863 and 1864, obtained an *alternative mandamus* from the Supreme Court of the State of New York, directed to the Supervisors, the defendants in error in this Court, requiring them to show cause why they had not audited the claim of the plaintiff in error under this State act. The writ alleges that the Supervisors "refused to audit or allow to said bank its claims for taxes paid in said years in said county [of New York] on so much of its capital as was invested in United States notes issued under the acts of Congress of February 25, 1862; July 11, 1862; the joint resolution of Congress of January 17, 1863, and the act of Congress of March 3, 1863." (*Record, page* 5.)

The writ also avers that portions of the capital of said bank which were taxed in said years were "invested in said United States notes," and that the taxes paid thereon amounted to forty-four thousand one hundred and forty-three dollars and ten cents, and that the Supervisors refused to audit the claim of the plaintiff in error "on the ground that the said United States notes were not exempt from State taxation." (*Record, pages* 5, 6.)

The Supervisors, now the defendants in error, admitited the allegations of the *alternative mandamus.*

Judgment was given in favor of the defendants; and on successive appeals that judgment was affirmed by the State Supreme Court, at General Term, and by the Court of Appeals, which is the highest court of law of the State of New York.

On the latter judgment the relators below sued out of this Court a Writ of Error.

The question discussed in the opinions delivered in the courts below was, whether by the Constitution or laws of the United States, or both, the said United States notes were exempt from taxation by State authority.

It does not appear by the record that any compulsory means were employed to collect the taxes in question, or that they were paid otherwise than voluntarily. And it is supposed that they were voluntarily paid.

POINTS.

FIRST POINT.—The judgment of the State Court is not subject to review in this Court.

I.—The plaintiff in error, having voluntarily paid the tax, had no right to recover it back, even in a regular action at law, or suit in equity. There was no color of a claim enforceable by *mandamus*, except such as might have arisen under the State Act of April 3, 1866.

II.—The reimbursement contemplated by the State in its legislative Act of April 3, 1866, was a voluntary grace and favor to a certain class of claimants upon its liberality.

III.—Neither when applying to the Legislature for this special act, nor when endeavoring by argumedt before the State Court, to obtain a construction thereof, which would bring the claim within its terms or intent, could the plaintiff in error be considered as setting up or claiming any title, right, privilege or exemption, under any clause of the Constitution or any statute of the United States. Consequently, the case is not within the twenty-fifth section of the judiciary act.

1 Statutes at large, p. 85.

IV.—When the plaintiff in error voluntarily paid the tax in question, it waived any *exemption* that may have existed. When it appeared as a suitor or party in the state court it had no *title*, *right* or *privilege* save such as may have been conferred by the state act. The construction import and effect of the constitution and laws of the United States in

respect to state powers of taxation were only incidentally brought under consideration in the state court; they were not "immediately drawn in question," within the true intent and meaning of the judiciary act.

V.—An agreement to pay a sum of money provided an act of Congress had a particular effect would not confer jurisdiction on this court to review the judgment of a State Court in the negative; yet, in principle, such a case would not differ from the present.

SECOND POINT.—The exemption of the public debt of the United States from taxation by State authority rests upon that clause of the Constitution which authorizes Congress "to borrow money on the credit of the United States" (*Art.* I, § 8, *subd.* 2, *Weston vs. Charleston*, 2 *Peters*, 449.) The exemption has no other basis. The instruments and organs whereby the Federal Government carries on its operations, as, for instance, its real and personal property, its corporate agencies, &c., are exempt. But it cannot be maintained that the claim of a person upon the Government is an instrument or agency, or that it is property of the Government. It is simply a property or "*chose*" belonging to the creditor.

I.—The power to provide and maintain a navy cannot be a basis of exemption; for *non constat* that these notes were issued for supplies to the navy.

II.—The power to raise and support armies is, for a like reason, incapable of furnishing any support to the exemption.

III.—The specific powers to coin money affords still less color for it.

IV.—If the power of paying the debts of the Government, as specified in the first subdivision, should be resorted to, the subdivision itself will furnish the answer. It is by levying and collecting taxes, duties, imposts, and excises, that the public debts are to be paid and not by granting exemptions. It would be a strange construction to hold that the power to pay debts included the power to exempt forever from State taxation the *money* paid to the creditor.

THIRD POINT.—Congress has no express authority to *grant* an exemption from the taxing power of the States; nor, in strictness, has that body any such implied authority. It is only where an exemption arises from the nature of the subject, and might be implied from the Constitution itself, that Congress may *declare* it. None of the cases allowing exemptions which have been decided by this Court depended, in any degree, upon the legislation of Congress. They all went upon the reason and nature of the thing. The exemption was necessarily implied therefrom.

FOURTH POINT.—In the reason and nature of the thing there is no ground for implying a power in Congress, or an intent by Congress, to exempt from State or other taxation, the United States notes commonly called "*legal tenders*."

I. They were intended to be, and in practice have become, the principal circulating medium of the country. They were designed to become *the* lawful money of the country; and in practice have become, as might have been easily foreseen, the *only* money in use. To make the current money of the country in the hands of individuals exempt from the common burden of contributing, like other property, to the expense of the local government, would be an extraordinary policy.

The intent, purpose, and effect of the acts authorizing these notes was to create a new currency—a new circulating medium—a new kind of money—in the United States, which was to be a substitute for and take the place of a metallic currency.

Paper money was substituted for metallic money. The paper money was called United States notes; but none of it was in any sense a promissory note.

The Government did not, in fact, contract thereby to pay the bearer on demand or at any time, for a promise to pay in a new promise is not a promise of payment; and inasmuch as these notes were made by the act a legal tender in payment of all debts, the only payment that the holder of them could legally damand would be a delivery of new notes of the same kind. They were promises to make other promises to be renewed *ad infinitum*.

A paper money which is not by the terms of the contract payable in specie or some

recognized value is but a promise to pay with promises. To say, then, that these notes were designed or used to borrow *money* on the credit of the United States is a confusion of language. All the credit they sought was that the receiver should confide in the promissor's promise to promise again whenever he was requested to do so. There never yet was a debtor so poor or so dishonest that he might not justly claim credit from all the world to this extent. The notes (so called) were by the act made money of the United States just as much as metal coined by the United States.

As far as the credit of the United States was involved in the issue of these notes, no greater responsibility was assumed than is assumed by any government in coining or otherwise affixing a stamp to metal and affixing to it a certain nominal value; although by mixing or debasing the metal, its *real* value, in use or exchange, may have been totally destroyed.

The acts in question endeavored to confer a prescribed value on certain stamped paper which they compelled the citizens of the United States to take in payment of all debts due, or to become due by the Government to them, or by them to the Government, or to one another.

By this means, instead of *borrowing money Congress made money* and rendered borrowing unnecessary.

There is really neither debtor nor creditor in respect to these notes. The suppo-

sed debtor does not promise to pay, and can not be compelled to pay, except by a new promise. There is no loan or evidence of loan.

The protection from State interference accorded by the Constitution to the exercise by the Government of the power of borrowing cannot be invoked in such a case.

II. In fact the issuing of those notes was neither more nor less than the creation, by right or without it, of a conventional money. It was the dictate of a supposed necessity; and so far as the measure was enforced by power or acquiesced in for convenience, the notes became, and were, for all purposes of trade and business, including taxation, conventional money. They were, and are, in every relation wherein they perform any function, or fill any office, simply money. In any other aspect they have neither actual or technical value. The State of New York and the bank in question acquiesce in their creation and concur in dealing with them and treating them as lawful or conventional money. As between parties thus regrading them, they had a substantial value to the owner; they were money and consequently a proper subject of taxation and could not fairly be exempted from it.

FIFTH POINT.—The acts of Congress relating to the financial operations of the government during the the civil war afford evidence that Congress did not intend that tho notes in question should be exempt from State taxation.

I. They are thoughout distinguishable from all other issues of the government by a name specially and exclusively appropriated to them. They are called "*United States notes.*"

12 Statutes at large 345, § 1. 2.

12 Statutes at large, 709.

13 Statutes at large, 219. 221. 222.

II. None of the *general* clauses of exemption apply to them.

1.—The "Act to authorize the issue of United States notes &c., passed February 25, 1862 (12 *Statutes at large p.* 345) after providing for the issuing of these notes, contains in its second section a provision to enable the Secretary of the Treasury to *fund* the Treasury notes and floating debt of the United States." The Secretary is authorized to issue coupon bonds or registered bonds, both bearing interest, and to dispose of the same for coin, for Treasury notes, "or for United States notes" *i. e.* the notes now under consideration. Immediately following this clause these words occur:

"And all stocks, bonds, and *other securities* of the United States * * shall be exempt from taxation, by or under State authority."

2.—The Ways and Means Act of June 30, 1864, § 1, (13 *Statutes at large, p.* 218, § 1) authorizes an issue of interests bearing coupon or registered bonds; and it authorizes the disposition thereof for certain interest bearing securities of the United States, and "*for lawful money of the United States.*"

These words, it will be seen, have now become descriptive of "*coin*" and "*United States notes*", the terms employed in the previous act.

And this very clause immediately precedes the general exemption declared *in this act.* That general exemption is as follows:

"And all bonds, Treasury notes, and *other obligations* of the United States shall be exempt from taxation by or under State or municipal authority."

3.—The word "*other*" when used in this way always refers to subjects *ejusdem generis* as those instruments in the enumeration or specimens expressed. In both of these acts it is manifest that interest bearing *securities* or *obligations* were alone referred to by the clauses of exemption. In the first act, the contrast between the exempted securities and these "United States notes" is quite apparent; but in the second it is intensely clear. The notes are described as "*lawful money*";

whilst the thing exempted is not lawful money, but "*obligations.*"

III.—If the *special* exemption expressed in the act of March 3, 1863, §1 (12 *Statutes at large*, *p.* 710), coupled with §3 of the same act, can be applied to "United States notes issued under the provisions of that act," it is an anomalous case, probably an inadvertence or slip in legislation—and the plaintiff in error can not derive any benefit from it on this writ of error.

1.—The relator should have shown that it held some particular amount of United States notes issued under this particular act; and

2.—Should have claimed under this particular act.

3.—The relator did neither, and this court can not supply the defect in its proceedings.

SIXTH POINT.—An act of Congress providing that lawful money paid by government to its creditors should be forever exempt from taxation by State authority would be unconstitutional and void. Consequently, if the exemption declared in the act of March 3, 1863, be applicable to the United States notes mentioned in §3 of that act, and the question is properly presented on the record, that exemption must be disallowed.

SEVENTH POINT.—Unless the writ of error shall be dismissed, the judgment given in the Court of Appeals should be affirmed with costs.

RICHARD O'GORMAN,
CH. O'CONOR,
of Counsel for Defendants in Error.

247

A REVIEW

OF THE

ARGUMENTS OF COUNSEL

IN THE

NEW YORK COURT OF APPEALS

ON THE

CONSTITUTIONALITY

OF THE LAW MAKING UNITED STATES TREASURY NOTES A LEGAL TENDER IN PAYMENT OF PRIVATE DEBTS, AND OF THE

OPINIONS OF THE COURT THEREON.

By WHEELER H. PECKHAM.

NEW-YORK:
BANKS & BROTHERS, 144 Nassau St.
1864.

A REVIEW

OF THE

ARGUMENTS OF COUNSEL

IN THE

NEW YORK COURT OF APPEALS

ON THE

CONSTITUTIONALITY

OF THE LAW MAKING UNITED STATES TREASURY NOTES
A LEGAL TENDER IN PAYMENT OF PRIVATE DEBTS,
AND OF THE

OPINIONS OF THE COURT THEREON.

By WHEELER H. PECKHAM.

NEW-YORK:
BANKS & BROTHERS, 144 NASSAU ST.
1864.

COMSTOCK & CASSIDY, PRINTERS, COR. BEAVER AND BROADWAY, ALBANY.

REVIEW.

The Constitution of the United States is peculiar. It is in no sense a check or trammel on the Government. It is no restriction of powers. It was not adopted for purposes of limitation. On the contrary its sole function is to grant, and any words in it of apparent limitation are not limitations of its powers, but only limitations of the *means* that may be used to exercise specifically granted powers.

In this respect the Constitution of the U. S. differs from any ever previously adopted. All the Constitutions of Continental Europe in form as well as purpose, are restrictions on, or rather distributions of, the sovereign power. Their purpose was to deprive the monarch of powers he had before exercised, either granting them to co-ordinate branches of the Government, or requiring them to be exercised in some special manner.

The English Constitution again is different from either. It consists, like the English Common Law, partly in custom and partly in specific statutes on specific questions; but there is no one organic Law. The English Constitution, however, has this one feature in common with those of all the different Continental nations of Europe, i. e. it is imposed or adopted by the Government itself. It is the creature of the Government, not the creator. It may restrict the powers of the monarch, but it enlarges those of the Legislature. The power may be intrusted to different persons, but the power itself is unabridged. Magna Charta may secure to the people of Great Britain certain rights and privileges; but the secu-

rity is against the King, not against the whole Government; for Parliament possesses full power to destroy those great bulwarks in a single day. In all these countries the Government may have different branches, yet in one or another part of it full sovereignty is lodged. There is no security, and can be no security against anything that the whole Government may chose to do.

Where then are to be found the checks and safeguards against this action of the whole Government? What security is there that when the King has admitted the Parliament to be a sharer in his powers, the people will not merely have exchanged one tyrant for many? What possible security has a minority against the worst of all tyrannies that of a triumphant majority? We apprehend it will be difficult to show any other security either in practice or theory, than the balancing of conflicting class interests. The history of the English Constitution has been but the history of the contests of the crown, the aristocracy or the lords and the people or the commons. And so long as the powers of these several parties remain so nearly balanced that neither can triumph unless by advocating the right, so long, probably, the checks and securities will be sufficient.

This system has its advantages and its disadvantages. It has the advantage of being possessed as a whole with all the powers of sovereignty, i. e. of absolute power. There is no measure which, in an emergency that seems to call for it, may not be carried out by the union of all branches of the Government. The views of the Government upon any question of policy, or upon the necessity for certain measures, or upon their tendency to effect certain ends, are not trammelled or controlled by the views statesmen of an earlier age may have taken as to the same policy, or necessity, or tendency. They are not disturbed with constitutional doubts. They are not compelled to risk not only the adaptation of their means to their end but the further, and sometimes graver questions whether the courts will not declare the invalidity of their

whole law as a means or measure tending to an end not authorized by the organic law of the land.

On the other hand its disadvantages are patent. Times of excitement and danger, demanding prompt and vigorous action are rarely well adapted to draw out the mature and best judgment of men. There is a great liability to adopt rash, hasty, and unwise measures. The check formed by conflicting interests is of little value in moments when those interests are forgotten—in the presence of a great danger common to all The Government becomes a unit without check or control, under the guidance of some leading spirit whose simple will then constitutes its laws. When the danger has passed, if the adverse interests are still strong enough to make themselves heard, all may be well; but if not the Government, retaining permanently the extraordinary powers intended to be conceded only temporarily, becomes the organ of a single class and as to the others a tyrant.

When the Constitution of the United States was adopted it was necessarily decided by those accepting it that the first class of dangers was less to be feared than the second. That the full and absolute powers of sovereignty could only be intrusted to the people themselves. That as Government was a means of the people for the purpose of accomplishing certain ends, the people would grant to it only so much of sovereign power as seemed adapted to those ends. What powers were adapted to those ends, the people at the adoption of the Constitution then and there decided.

There were many reasons inducing them to do this.

Chiefly perhaps was the entire want in our country of any such conflicting classes or class interests as have contended for power in England and Europe during their known history. Here was no King, here was no privileged aristocracy, here no great landholders. There was but one great people, and with only individual and not class interests. There existed then no check of this kind, and the materials were wanting out of which to construct it. More that this there was

the apparent insufficiency of the system itself. As a system it has been more or less tried in principle in every nation in Europe, and unless England be an exception it has in every instance failed. A very cursory examination of the History of England will show that she too is no exception to this rule.

She has and has had three great classes, so to speak in her commonwealth—the monarch, the aristocracy and the commons. Were these three powers so equally balanced that neither could prevail against the others unless by the aid of right, the Government would be perfect of its kind. But have they ever been so balanced? Can they be kept so balanced?

In the days of the Tudors the absolutism of the Crown was practically unquestioned. In the days of the wars of the Roses the nobles were certainly the power of the State. And in the days of the Long Parliament *its* authority was supreme. In each case the only check applied was that of force. The present power is that of the Commons, and if it did not win its way to power by absolute force, the threats and intimidations that attended the passage of the Reform Bill of 1832 were such as to make the difference not much more than a distinction. Since then the Commons have been rapidly growing in power, and it is difficult to perceive the obstacles to their absolute control. The Commons control the monarch; the monarch, by his power of creating peers, controls the lords; and inasmuch as constitutional law in England is discussed only and finally in Parliament, where is the check to the absolute power of the Commons?

Here then was a power to be feared, to be controled, and provided against; unless we concede it to be undesirable to check the power of the majority, unless we contend against the possibility of the tyranny of the many, unless we can suppose that the framers of the Constitution intended to introduce a system of uncontrolled democracy.

There was another strong reason inducing the framers of the Constitution to adopt the system of only delegated powers. It was, that in the present system they could retain all the beneficial features of checks by opposing classes which could be wrought out of the materials existing in the country. The division of the Executive, Legislative and Judicial departments, the division of the Legislature into two branches, the partition as it were of power between the General Government and the States were all measures whose aim and tendency were to have all opposing interests and classes represented. But in a new country like ours, free from the prejudices and class divisions that exist as recognized powers in older parts of the world, it was felt that such provisions alone would be insufficient. They had not the same force here as in the Old World. They could not be relied upon as checks. If their power was questionable in England it would be clearly inadequate here.

In order then to remedy these defects, it was determined to organize a government that should *not* be sovereign, to retain all sovereignty in the people except such sovereign powers as by the Constitution were expressly granted to the Government. This in itself was a complete revolution upon all former systems of government. It was a radical and fundamental change, creating a system not only new but almost without analogy.

In order to sustain this system, and indeed as the main foundation thereof, the constitutional jurisdiction of the Supreme Court of the United States was given to it, *i. e.:* its jurisdiction to decide whether any laws that may have been enacted by the legislative branch or any acts that may have been done by the executive branch are authorized by the Constitution. Not whether they are *forbidden* by the Constitution, but whether they are *authorized.*

This is a power never before given to the Courts in any nation. The Constitution was an experiment, undertaken to promote the happiness and prosperity of the people. It

the apparent insufficiency of the system itself. As a system it has been more or less tried in principle in every nation in Europe, and unless England be an exception it has in every instance failed. A very cursory examination of the History of England will show that she too is no exception to this rule.

She has and has had three great classes, so to speak in her commonwealth—the monarch, the aristocracy and the commons. Were these three powers so equally balanced that neither could prevail against the others unless by the aid of right, the Government would be perfect of its kind. But have they ever been so balanced? Can they be kept so balanced?

In the days of the Tudors the absolutism of the Crown was practically unquestioned. In the days of the wars of the Roses the nobles were certainly the power of the State. And in the days of the Long Parliament *its* authority was supreme. In each case the only check applied was that of force. The present power is that of the Commons, and if it did not win its way to power by absolute force, the threats and intimidations that attended the passage of the Reform Bill of 1832 were such as to make the difference not much more than a distinction. Since then the Commons have been rapidly growing in power, and it is difficult to perceive the obstacles to their absolute control. The Commons control the monarch; the monarch, by his power of creating peers, controls the lords; and inasmuch as constitutional law in England is discussed only and finally in Parliament, where is the check to the absolute power of the Commons?

Here then was a power to be feared, to be controled, and provided against; unless we concede it to be undesirable to check the power of the majority, unless we contend against the possibility of the tyranny of the many, unless we can suppose that the framers of the Constitution intended to introduce a system of uncontrolled democracy.

There was another strong reason inducing the framers of the Constitution to adopt the system of only delegated powers. It was, that in the present system they could retain all the beneficial features of checks by opposing classes which could be wrought out of the materials existing in the country. The division of the Executive, Legislative and Judicial departments, the division of the Legislature into two branches, the partition as it were of power between the General Government and the States were all measures whose aim and tendency were to have all opposing interests and classes represented. But in a new country like ours, free from the prejudices and class divisions that exist as recognized powers in older parts of the world, it was felt that such provisions alone would be insufficient. They had not the same force here as in the Old World. They could not be relied upon as checks. If their power was questionable in England it would be clearly inadequate here.

In order then to remedy these defects, it was determined to organize a government that should *not* be sovereign, to retain all sovereignty in the people except such sovereign powers as by the Constitution were expressly granted to the Government. This in itself was a complete revolution upon all former systems of government. It was a radical and fundamental change, creating a system not only new but almost without analogy.

In order to sustain this system, and indeed as the main foundation thereof, the constitutional jurisdiction of the Supreme Court of the United States was given to it, *i. e.:* its jurisdiction to decide whether any laws that may have been enacted by the legislative branch or any acts that may have been done by the executive branch are authorized by the Constitution. Not whether they are *forbidden* by the Constitution, but whether they are *authorized.*

This is a power never before given to the Courts in any nation. The Constitution was an experiment, undertaken to promote the happiness and prosperity of the people. It

was prepared with the greatest deliberation, and by the aid of the most matured and sagacious intellects of the age. Every sentence, almost every word, was the subject of the most careful scrutiny.

It was well understood that an instrument was being prepared to control and guide a nation in the far distant future, and through all the varying contingencies through which it necessarily would pass.

The grave and most important duty of seeing that this experiment was fairly carried out was intrusted to the courts. The purpose was to give only certain powers to the legislative and executive branches. The framers of the Constitution were not foolish enough to make a grant of power, and then make the grantees judges of the scope and effect of the grant.

With such a tribunal to construe, there would indeed be little use in construction.

And in order to make the trust effectual—in order that the tribunal which was to decide upon the authority of the acts of the legislative and executive, might be above both and beyond the control of either, its organization was made independent, and its existence placed directly under the protection of the Constitution.

"It was erected (says Chief Justice Taney,) and the powers "of which we have spoken conferred upon it not by the "Federal Government, but by the people of all the States, "who formed and adopted that Government and conferred "upon it all the powers, legislative, executive and judicial, "which it now possesses. So long, therefore, as the Consti- "tution shall endure, this tribunal must exist with it, decid- "ing in the peaceful forms of judicial proceeding the angry "and irritating controversies between sovereignties which in "other countries have been determined by the arbitrament "of force."

Here then, we have the true theory of our Government. There is no sovereignty but in the people. In every other

country in the world the Government is sovereign. Here it is not. The States are not sovereign powers. The General Government is not sovereign, for it is but the donee of certain special and restricted sovereign powers. The sovereignty is in the people, and the people have only given certain restricted commissions to the General and State Governments, conferring on them as their agents, certain, and certain only of its sovereign powers; and further than that, *the people* have erected a Supreme Tribunal, whose duty it is to see that the limits of those commissions are not overstepped.

Of course it is at once apparent, and of course at the time of the formation of the Constitution it was foreseen that, under such a system, one great, ever varying, yet ever the same contest would arise. That contest, by some would be described as the struggle between conservatism and progress, and by others, the word radicalism would take the place of progress, and by others, the words old fogyism the place of conservatism. So far, however, as a reasonable progress is concerned, the Constitution itself has amply provided for it by its clauses for amendments. There can never be any issue between the Constitution and true political science or principle. Whenever a novelty becomes sufficiently well understood, and is urged by sufficient reasons to convince the majority of the people of its excellence, not as a matter of temporary excitement, but after full and calm discussion, the doors of the Constitution are wide open to its adoption.

But there now exists, always has existed, and probably ever will exist, a class of men who desire to carry out their own personal present views, whether of policy or of law, irrespective of all check; men who believe in the propriety of the absolute and untrammeled power of those who, for the moment, administer the Government; men who are unwilling to take any light from the past; who will learn nothing from the experience of others; men of that absolute confidence in the correctness of their own views, that they are willing to use even brute force to compel their general or universal adoption.

The difference is slight whether men of this class entirely disregard the Constitution on the familiar plea of temporary necessity, or whether they assume to follow the forms of the Constitution, but by forced and far fetched construction evade and disregard its spirit. Their purpose may, in plain terms, be stated as unconstitutional; their political faith and theory, whatever else they may be, are not that of the Constitution.

Aside from these political principles of certain men, it will probably be readily acknowledged that there is in all Governments a tendency to absolutism—whether that of the individual or of the mass—of the monarch or the majority; unchecked this tendency is sure to be achieved.

Now, so long as we have a Constitution, so long as after a full consideration of the subject, we have adopted the doctrine of delegated powers, as safer than that of conflicting interests, it would seem to be too plain for argument that a strict adherence to its provisions is required. In a mixed Government like ours, there will ever be those on the one side who favor a too large and on the other a too narrow construction of the organic law. It is for the Judiciary, with the Constitution lying open before it, to decide on these contests, to decide on them too without regard to extrinsic circumstances, except in so far as the circumstances serve to present the question—to look at the text alone, and by the aid of such rules of construction as have been evolved by the wisdom of the law, to determine the constitutionality or unconstitutionality of a law, by simply determining whether the power to make such a law is written down in the Constitution.

The stupendous nature of this power can only be appreciated when we look at the consequences. Upon this one question of the ablity of courts thus to decide, uninfluenced by ought but the written law, depends the success or failure of this plan of Constitutional delegated Government. If the courts are firm, upright, independent and able, the Constitution is safe; Liberty is safe, and the Republic will be

preserved. If the courts fail—if the exigency of the moment, the pressure of the times, the popular cry, force themselves between the judicial eye and the clear texts of the Constitution; if they suffer themselves to be influenced by suggestions of expediency or consequences, if they assume to step beyond their province and judge rather of the wisdom of the Constitution than of what is found therein, then slowly it may be, but surely the Constitution is destroyed and the Republic is lost.

The keystone of our system is this independent judiciary. The great question is, whether it be possible in the midst of a nation excitable, nervous, energetic above all others, to find a class of men who can so far separate themselves from the turmoil around them as to judge of facts solely by the written law. It is not sufficient that they should be free from corruption and all the baser crimes; it is required that they should be calm in the midst of violence; that they should be full of high courage when others are trembling with fear; that they should look to the Constitution as the one absolute fountain of right, when others are appealing to higher laws or turning to so called military necessities.

Here, then, is the essence of our whole system; here is the test by which it must stand or fall.

The simple question is, can the judiciary be depended on? Will it have the courage and ability to stand fast in the midst of the torrent that is rushing around it?

The answer to this question seems by no means certain. In many of the States the courts have shown a strong tendency to be influenced by the same temporary views of expediency that have controlled the other branches of the Government. It is but a few months since the Supreme Court of Indiana while announcing its clear conviction of the unconstitutionality of the legal tender act, yet decided otherwise confessedly on grounds of expediency. The same course of action has been taken by the courts of many States in regard to laws impairing the obligation of contracts,

passed to protect debtors in times of great financial pressure. True these decisions have hitherto mostly been made by State courts organized on the unsound basis of an elective judiciary; but the history of the Supreme Court of the United States is perhaps not entirely free from the same charge.

These reflections do not seem less opportune after reading the arguments of counsel on the constitutionality of the law, commonly known as the legal tender law, before the Court of Appeals in June last, since published together in one pamphlet. The question came up in two different cases, and was argued for the constitutionality of the law by Bernard Roelker, Esq., and William Curtiss Noyes, Esq., of New York, and Lyman Tremain and John K. Porter, Esqs., of Albany, and against by J. V. L. Doty and Geo. T. Curtiss, Esqs., of New York. They are all gentlemen of the highest ability, and of the front rank in their profession. They were arguing a question of the greatest possible gravity and importance, before a learned and dignified court; the highest judicial tribunal of the State of New York. It was a question too, not of propriety, expediency, or necessity, but simply one of power; and yet to read some of these arguments one would think the speakers had been addressing a mass meeting, and even to such an audience some of their expressions would seem rather outré.

Mr. Tremain, in speaking of the necessity that existed for such a law, says: "An army numbering its hundreds of thousands of *armed traitors, robbers and assassins* menace the Capitol of the nation." Again: "Let the close-fisted miser "clamor for gold if he will—let the sordid and unpatriotic "continue to exhibit a stronger loyalty to a metallic currency, "than to the Government of their country if they will; let "the disloyal rail on against greenbacks if they desire; but "let no branch of the Government fail to perform its duty. "Let the Government return good for evil; having the care "of lunatics, idiots, and persons of unsound mind; let its

"parental guardianship be extended also to all these "classes."

Mr. Porter, after a most glowing description of the rebellion, and after a most extraordinary statement of the need of the Government on the 3d of March, 1863, of sixteen hundred millions, beyond all revenues from taxes, customs, and sales of public lands to meet "its current obligations" says: "The question presented to Congress for "decision was, shall the Government be dissolved? The "alternative was the exercise in a period of public war, of "*an inherent sovereign* power not *prohibited by the* Constitu- "tion or a bankrupt treasury, a bankrupt people and a Gov- "ernment overthrown." These extracts are but samples of the general tone of the arguments of these two distinguished gentlemen. No wonder that Mr. Curtiss remarked in closing his case, "I am sure it cannot be expected of me that I should "reply to a very large portion of the remarks which have "been submitted to your honors on the other side; and which "I mean to say it, without the slightest disrespect to the "gentlemen, have, as it seems to me, tended to afford no aid "whatsoever to the court in the discharge of their duties." That of Mr. Noyes is somewhat less peculiar, but still partaking of the same general character. Mr. Roelker alone of those arguing in favor of the law, presents a simple legal argument without any of the ad captandum declamation apparently so much relied on by his colleagues.

On the other side Mr. Doty confined himself mainly to a consideration of the question as affected by the laws of New York. Mr. Curtiss presented a clear concise legal argument upon the whole question.

The arguments for the constitutionality may be resolved into two: 1st. That the power is included in the clause authorizing Congress to coin money, and that issuing promissory notes and making them a legal tender is coining money. 2d. That the power is one of the implied or inherent powers of Congress, and the section which

authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof," is mainly relied on. Mr. Tremain says, this case calls for a judicial construction of the implied powers of Congress, and that "by implied powers he means those embraced under that section," and yet, in the next sentence, concedes that no new powers were granted by that clause. In other words Mr. Tremain here makes the extraordinary statement that the case calls for a judicial construction of the powers granted by a clause which he concedes granted no powers. Mr. Porter claims the power to be not granted, but *inherent*, and yet labors most *strenuously* to show that it *was* granted by the seventeenth subdivision of the 8th section of article 1st.

In order to understand both the force and the weakness of these arguments, it is necessary first to lay down some general principles.

It was and is an elementary principle of our Government that sovereignty belongs to the people. The theory of divine right was utterly discarded and the people recognized as the fountain of all political power. What then is sovereignty? It is full complete absolute power, and consists in the right and ability to exact habitual obedience in an independent political community. (See Austin's Province of Jurisprudence Determined, chapter on Sovereignty.) In the formation of the Constitution this full sovereignty, while recognized as being in the people, was granted to no Government. On the contrary, that sovereignty was by that instrument practically divided into parts called powers. Certain of these powers were granted to the General Government, and certain of them were reserved to the States and certain of them were reserved to the people alone. Sovereignty then, by the Constitution, is divided into three parts—one part is granted to the United States, one to the States, and one is

prohibited to either and reserved to the people. These three include the whole of sovereighty. "*Powers*" is the constitutional word for expressing a part of sovereignty. Sovereignty, as we have seen, consists in the right to prescribe laws. It is divided in the Constitution in the only manner in which it is capable of division; *i. e.:* into the subjects upon which its partial holders may enact laws. The different subjects over which sovereignty is granted to the General Government are called powers or sovereign powers.

The Corporation or Government of the United States was by the Constitution called into existence and made the donee of these powers; the States, although existing before, yet gave up their old charter or existence and commenced a new existence under and by virtue of that Constitution.

The powers of Congress then are simply an enumeration of the subjects over which Congress is sovereign.

Congress then being sovereign, or in other words, having the right to prescribe laws on certain subjects, it might fairly be inferred that it would have the right to make laws on those subjects as the mode of exercising its sovereignty; still for greater caution and for no other purpose the 17th subdivision of section 8th was added, giving it power to make all laws upon the subjects of its sovereignty necessary and proper to exercise its powers. The clause is virtually tantology.

There can then be no such thing as *implied powers* of Congress; or, in other words, implied subjects over which Congress is granted sovereignty. Full sovereignty is the right to prescribe laws on all subjects. The subjects of Congressional sovereignty are enumerated or delegated, and those not delegated are reserved to the States or to the people. This treatment disposes of all subjects, or in other words, of the whole of sovereignty. Where then can be the implied powers? It is evident that there is no such thing under the Constitution as an implied power—that Congress has no implied powers; or, in other words, that there are no subjects over which Congress has an implied sovereignty.

But while the Constitution clearly and specifically expresses the subjects over which the United States shall be sovereign, it does not with certain special exceptions assume to prescribe the manner of the exercise of those powers; or, in other words while granting to the United States sovereignty or the right to prescribe laws on certain subjects, it does not assume to prescribe what those laws shall be. Provided the object is the exercise of a granted power; or, in other words, provided the subject is one over which sovereignty is granted to Congress, Congress has full and exclusive choice of the *means* to attain that object; or, in other words, has full and exclusive choice as to what laws it will prescribe on that subject. The exercise of the power is the end; the law passed is the means. We concede in the fullest possible manner that if the end or object of the law be the exercise of a granted power, any law or means that might, under any circumstances, be necessary and proper, or useful and conducive towards effecting that end, or to the exercise of that power would be constitutional, provided only they are not a means specially prohibited in section nine or elsewhere. Neither section nine nor the amendments are a denial or prohibition of powers or subjects of sovereignty to Congress—of that there was no need; but they are a prohibition upon the use of certain means in the exercise of the powers that are granted, or in other words, a prohibition to prescribe *certain* laws on subjects over which sovereignty or the right to prescribe laws, is granted to Congress. There is not, in that section, or the amendments, a prohibition of anything as a subject of legislation; but the prohibitions are of certain kinds of legislation on any subject, or in other words, the use of certain means. To illustrate: The power to lay and collect taxes is specially granted; a capitation tax without reference to census, or a tax on exports would be a means useful and conducive to that end, or to the exercise of that power, but they are a means specially prohibited.

Three questions and only three may thus arise as to the constitutionality of a law of Congress: 1st. Is the object or

end of the law the exercise of a granted power? 2d. Is the law as a means necessary and proper, or, as those words have been judicially construed, useful and conducive to the attainment of that end? 3d. Is the law, as a means, specially prohibited. The first two questions must be answered in the affirmative and the last in the negative, before any law can be declared constitutional. Precisely here lies one of the most glaring and yet specious fallacies of Mr. Noyes' argument. Mr. Noyes says, p. 207, "all the powers vested in the Gov-"ernment thus created are then necessarily sovereign, and "they embrace all the means essential to the attainment of "the ends of such powers and which are not precluded by "the restrictions and exceptions of the Constitution itself." Let us see where this doctrine would carry us. By the "ends of such powers" Mr. Noyes must mean the purposes for which the powers were granted. The preamble of the Constitution expresses those purposes in the clearest language: "We, the people of the United States, in order to form a "more perfect union, establish justice, ensure domestic tran-"quility, provide for the common defense, promote the "general welfare, and secure the blessings of liberty to our-"selves and our posterity, do ordain and establish this Con-"stitution for the United States of America." According to Mr. Noyes the powers vested in the General Government embrace all the means essential to the attainment of the ends recited in the preamble, and the criteria of the constitutionality of a law is whether it can be useful and conducive to the attainment of any of the ends recited in the preamble. Were that so it is difficult to discover the object of the Constitution in retaining the State Governments, or in making any specific grants of power. But Mr. Noyes is claiming for Congress a right that belonged to and was exercised by the Constitutional Convention, *i. e.:* the right to decide in order to attain the purposes of the preamble what powers should be granted to the United States or reserved to the States or the people. The U. S. Government was created and certain

powers given it for the purposes declared in the preamble. The *Convention* decided what powers would be conducive to the effecting of those purposes, and the power of Congress is limited to the passing of such laws as may carry into effect the powers *granted* and *not such* as may attain the *ends* for which the *powers* were *granted*. Had Mr. Noyes claimed that the "powers thus created embraced all the means essential to *their* exercise or to carry THEM into effect, we would not differ with him.

His claim as he has written it is opposed to the most essential principle of the Constitution, *i. e.:* the principle of the Government possessing only the delegated powers.

The United States then being the grantee of certain specified powers, no claim to exercise powers other than those granted can be admissible on the ground of their being useful, or conducive, or necessary and proper to the exercise of those that are granted. In other words, the United States having the right to prescribe laws on certain subjects no claim on its part to prescribe laws on other subjects is admissible on the ground that its legislation on such other subjects is necessary and proper, or useful and conducive, to its effectual legislation on the subjects really granted. That is, laws prescribed by the United States must always have a direct reference or relation to the subjects on which the United States has a right to prescribe laws; or in other words, to the execution of some one or other specified power. There may be many means and manners of executing or carrying into effect a power, but no one power can ever be claimed as a means of executing another. Otherwise, the delegation of distinct powers becomes an idle fancy.

Having thus found the tests by which to try the constitutionality of any law, our next step is to examine the proposed law and the nature of its subject matter.

The law treats of two things: 1st. Of money. It declares that certain things shall be lawful money of the United States. 2d. Of the promissory notes of the United States, or in other

words, of the credit of the United States. It authorizes the issuing of a great number of United States promissory notes, and declares that they shall be money and a legal tender in payment of debts.

1st. What is money? Money is simply a piece of certain quantity and quality of an article of exchangeable value, which, from the possession of certain qualities, has been by a sovereignty adopted as a medium of exchange, and which piece has been stamped or authenticated, or its stamp or authentication adopted and made a legal tender by the sovereign authority.

Mr. Roelker gives the following definition of money: "It "is that general medium of exchange by reference to which, "the value of other things is estimated, and by the instru- "mentality of which, the exchange of labor and commodities "is effected." And Blackstone's definition is "that money "is the universal medium—the common standard, by a com- "parison with which, the value of all merchandize may be "ascertained; or, it is a sign which represents the respective "value of all commodities."

Both these definitions are fatally deficient in two respects:

1st. In ignoring the most essential feature of money, viz: that it shall be coined or stamped by or under the authority of, or its stamp, if foreign, adopted, and made a legal tender by the sovereign authority.

2d. In taking for granted, rather than clearly stating so important an attribute of money as that it should be an article of exchangable value.

As to the first respect. To show that the stamping and delaring it a legal tender by the sovereignty are essential elements of money, it is only necessary to remember that, what is money in one country or sovereignty ceases to be money when it passes the boundary of that country or sovereignty. It then becomes mere bullion, or an article of merchandize. The precious metals in their natural state, or as mere bullion, would answer the definition of both Mr.

Roelker and Blackstone much better than money. If a foreign coin is adopted by another sovereignty, and that coin declared a legal tender for a certain sum, then indeed it becomes money, but only because its stamp is so adopted, and it made a legal tender. The facilities given to commerce by a medium of exchange had been observed, and a medium adopted before money was known. Different ages and nations have adopted different materials for this medium. In Abysinia they use rock salt at the present day. But at a very early stage of civilization the superiority of the precious metals for this purpose was perceived, and their use practically adopted. Still that did not make them money. They formed a medium of exchange, because the relative value of commodities was expressed by their relation to a pound or ounce or other quantity of a certain quality of gold or silver. But at this stage the precious metals would not pay a debt unless at the option of the creditor, any more than any other commodity. The next step in advance was to have pieces of the precious metals assayed and weighed and their quality and quantity thus stamped upon them. This process, if the stamp was credited, saved the weighing and assaying of the metals in every operation in which they were used. This process which has since acquired the name of coining, was first performed by individuals; but as the credit of individuals could not but be local and transitory, differing only in degree, the expediency of the State undertaking it soon became apparent. The certificate of the State unworthy of credit as it has in many instances proved to be, was yet the best that could be obtained. Even yet, after the State had assumed the coining of the metals, that did not make them money. Their use and acceptance in payment of debts was optional with the community. A creditor would not be obliged to give faith to the Government Certificate, but might require the account to be made even in the article dealt in. But where Governments not only coined the precions metals, but compelled faith in their cer-

tificates, and the acceptance of the article so certified, by making it a legal tender, they *then* became money. The medium and measure of values was the same as before, i. e.: the precious metals. Values were measured as before by their relation to a certain quantity and quality of those metals. But now people were required to give absolute faith to the Government Certificate that the quantity and quality of the metals in their coinage was as the coins purported, and they were compelled to receive this coined metal in payment of debts.

No one would now claim that gold and silver bullion are not the real medium of exchange throughout the so called civilized world. In all international exchanges the parties are precisely where they were before Goverment coined money or made these stamped metals a legal tender. There is no common money that both are compelled to recognize. With firms in New York and London dealing together, the accounts on one side are kept in dollars and cents, and on the other, in pounds, shillings and pence, but the medium is gold, and the quantity and quality of gold in a pound or a dollar being known, exchanges are not difficult. We thus find that the term medium of exchange, by no means defines money, but that money must be made out of a medium of exchange, and that being a medium of exchange, is but one of the characteristics of money. That its further and most essential qualities are being coined and made a legal tender by the sovereign power.

This act of coining and making a legal tender of the precious metals has no reference to or effect upon prices, or the relation between the metals in the shape of money and commodities. The power to declare maximum and minimum or fixed prices has never been supposed or claimed to grow out of or have reference to or to be of the same nature as the power to coin and make a legal tender either of the precious metals or of anything else. But the act of coining does have reference to and should always have annexed to

it the power to regulate the value of money in the relation of the different coins to each other. That is if a sovereign coins two different coins, such sovereign should have power to declare how much of one coin should be regarded as equal in value to another. This is necessary for two purposes: 1st. In order to prescribe a system of notation; and 2d. In order to accomplish the use of inferior articles to exchange inferior values and yet retain the one measure by making the inferior coin a legal tender only in the payment of small debts or to a certain amount. This act of prescribing a system of notation and fixing the relative values of the coins in that system, in regulating the value of money and regulating the value of foreign coin is simply giving them a place in the national system. The act of changing the quantity or quality of the coins, or in other words, the standard without changing their denomination, or the law making coins of that denomination a legal tender, is not a regulation of the value of money in any sense. It is a depreciation of the standard or a debasement of the coin. Such an act would have no effect whatever upon values. The relative value of the precious metals and other commodities would be the same, but all existing debts would be *pro tanto* repudiated.

As to the second respect—

Notwithstanding the great variety of articles used by different nations as a medium of exchange, they have all had an intrinsic exchangeable value. The coining of money is, as we have seen, the mere certificate of the quantity and quality of the piece. The power of the Government is limited to the choice of the most eligible article therefor. It cannot of itself add to or take away from its value. If it takes an article of no exchangeable value, as atmospheric air, it cannot make it a medium of exchange, or regulate it as a medium. Leaving out Blackstone's phrase as to money being a sign (which in the present age is absurd), both his definition and that of Mr. Roelker would imply this.

Money then being an article of exchangeable value, it is capital or the product of labor, and being capital it is an element or means of production. Money then is a form of capital. It is important that this element should be brought out distinctly in any definition of money in order to distinguish it from credit.

Credit is not an element in nor has it the power of production—it is not in itself an exchangeable value. It represents a value ; it is as it were the title deed of a value, or it is the promise of a value, but it is not itself that value.

In civilized communities credit actually has, as we might easily suppose it would, become useful in effecting exchanges, but it is as credit and not as money or capital ; as the representative of value not as the value. It does not supersede or take the place of money. It represents money. "Mr. Curtiss weakens and obscures his otherwise able argument when he speaks of money as a representative or token of value." Money is a representative or token of value in *no sense* whatever. It is in itself the actual value or capital, and is only a measure of value insofar as the value of other things is expressed by their relation to it. But *credit is* a representative of value. Credit is useful in its own sphere, but it cannot take the place of money. It is a mode or manner of exchanging but not a *medium* of exchange. Were credit ever so plenty, commerce would still require a medium of exchange upon which credit might act as it were, or in other words which it might represent.

We thus define money to be a piece of certain quantity and quality of an article of exchangeable value, which (from the possession of certain qualities) has been adopted by a sovereignty as a medium of exchange, and which peice has been stamped or authenticated, or its stamp or authentication adopted by and made a legal tender by the sovereign authority.

We think this covers such foreign coins as have been made money by the regulation of their value, and we think it more clearly states the quality of money that specially distinguishes

it from credit—to wit, that it must be in itself an exchangeable value, and that other quality that distinguishes it from bullion or the raw material of money—to wit, its being a legal tender. The clear understanding of these two elements we regard as most essential to a correct decision of our final question.

What now are these promissory notes that the U. S. have issued and called money? They are not money inasmuch as they do not possess the most important attribute of money that of being a value or capital. They are, on the contrary, simply a promise of value, or in other words, credit. All political economists admit that what is called paper money, no matter how or by whom issued, is not capital but simply credit. True a man possessing these notes or holding other credits may be said in a general way, to be possessed of capital, but his possession consists really only in the right to demand the possession of the capital from the hands of his debtor who has the actual possession, and if the debtor has not the actual possession, and cannot respond to the demand, the possession of the notes does not make their possessor a capitalist. But though credit is not capital, and cannot assist in production, it yet has great efficacy in effecting the exchange of capital or commodities. It is a purchasing, though not a producing power, and its power of purchasing is limited to the power of production of the capital borrowed. If A. borrows money or capital of B., and gives his notes or credits for them, A. must expect to complete a production by means of the borrowed capital before the expiration of his credit, in order to have the means of repayment, and to make a profit. Still in all this it is plain that the credit which is the instrument of transfer of the capital, is not in itself a value.

This shows the impossibility of producing what is called a fixed capital by means of short mercantile loans. If a manufacturer should purchase his machinery without capital and by the issue of paper money he must necessarily fail; for the machinery not being intended for sale, he could not meet his paper money on presentation.

The operation would be simply borrowing the machinery—and at the end of the credit returning it.

The essential element of credit is that it *represents* value or capital, while money *is* value or capital. Both are useful in effecting exchanges; money, alone, is capable of production.

Credit is also personal. It cannot be loaned or sold. Its possessor may use it for the benefit of another—an operation commonly and incorrectly called loaning it—but the only manner in which its owner can really part with it is by parting with the capital which it represents. For even a person of high character who without any capital yet is able to borrow can only do so because he is about to use the capital borrowed in production and thus be able to repay, so that his credit or the credit given to him represents the capital he has borrowed and invested in production. It is impossible for credit to exist except as a representation of capital. In other words credit is the operation by which one is allowed to use the capital of another. When the credit of an individual or corporation is used in small quantities as in bank bills, and payable on demand, such bills become available as a general substitute for currency. They are the tokens or representations of an actual capital which the holder has in the hands of the bank or individual issuing them. The transfer of them operates as a transfer of that capital or of the right to demand that capital. They are of precisely the same nature as a check or draft, and differ only in their facility for general use.

They are the same improvement in the transfer of capital that deeds are in the transfer of land over the ancient livery of seisen. If, however, an individual or bank issues bills to a greater amount than its capital, the bills depreciate and their credit is controlled by the capital they represent without regard to their denomination. As if A having a capital of $1,000 should issue bills to the amount of $2,000, the credit or purchasing power of the $2,000, issue would be no

greater than if the issue had been denominated $1,000, because they would represent only that amount of capital.

But all credit is not a representation or token of money any more than all capital is money itself. Men borrow and lend many other things besides money. So much of credit as does represent or is a token of money, becomes or may become a representative of currency or what is commonly called a paper currency.

Governments rarely or never borrow money or capital for purposes of production. Therefore the credit of Government can never be based upon its ability to produce a profit from the sum borrowed. The capital is borrowed to be used or destroyed, and the Government expects to repay the loan from other resources. It is the same as if an individual borrowed to invest in fixed capital, expecting, however, to repay from other sources than its sale. If a Government has resources from which it will be able in one year to raise $1,000, it will as a consequence of that resource have a credit or be able to raise forthwith by loan the sum of $1,000, less the interest for one year. Its bonds or notes then for $1,000, payable in one year, would sell for $930 if the interest was 7 per cent. Its resources then being unaltered, its bonds or notes for $2,000 or $3,000 would sell for no more than $930, because that is all the capital they would represent. The only effect of making them a legal tender would be a confiscation or repudiation of a certain portion of past debts. The effect would be precisely the same as a debasement of the coinage only more specious and more easily effected.

Except in the way of repudiating its debts a Government cannot get more capital for its credit than its credit fairly represents. So much for the general nature of credit. But when credit is considered in its relation to and as forming a substitute for currency, there are some further phenomena to be considered. So long as a credit substitute for currency is really and in fact a representative of money, or in other

words, so long as it is convertible and its issuers can and do keep their promises, it cannot be issued in excess. But when it ceases to be convertible or to represent money, when it is attempted to create a credit in excess of the capital represented, or in other words, when it is attempted to create credit without creating capital, it *may* be issued in excess and that excess is sure to be followed by evils in exact proportion to the amount of the excess. The attending phenomena cannot be better described than by Mr. Mill in his work on Political Economy, vol. 2, page 74:

"Suppose, says Mr. Mill, that in a country of which the "currency is wholly metallic, a paper currency is suddenly "issued to the amount of half the metallic circulation, not by "a banking establishment or in the form of loans, but (as "in this case,) by the Government, in payment of salaries "and purchase of commodities. The currency being sud- "denly increased by one-half, all prices will rise, and among "the rest, the prices of all things made of gold and silver. "An ounce of manufactured gold will become more valuable "than an ounce of gold coin by more than the customary "difference which compensates for the value of the work- "manship, and it will be profitable to melt the coin for the "purpose of being manufactured, until as much has been "taken from the currency by the substraction of gold as has "been added to it by the issue of paper. Then prices will "relapse to what they were at first, and there will be nothing "changed, except that a paper currency has been substituted "for half of the metallic currency which existed before. "Suppose now, a second emission of paper, the same series "of effects will be renewed, and so on until the whole of the "metallic money has disappeard. The addition made to the "quantity of gold and silver disposable for ornamental pur- "poses will somewhat reduce for the time the value of the "article, and as long as this is the case, even though paper "has been issued to the original amount of the metallic cir- "culation, as much coin will remain in circulation along with

"it as will keep the value of the currency down to the reduced "value of the metallic materials; but the value having fallen "below the cost of production, a stoppage or diminution "of the mines will enable the surplus to be carried off by "the ordinary agents of destruction, after which, the metals "and the currency will recover their natural value. We are "supposing that the country has mines of its own, and no "commercial intercourse with other countries, for, in a "country having foreign trade, the coin which is rendered "superfluous by an issue of paper, is carried off by a much "prompter method.

"Up to this point the effects of a paper currency are sub- "stantially the same whether it is convertible into specie or "not. It is when the metals have been completely suppressed "and driven from circulation, that the difference between "convertible and unconvertible paper begins to be operative. "When the gold or silver has all gone from circulation, and "an equal quantity of paper has taken its place, suppose that "a still further issue is superadded. The same series of phe- "nomena recommences—prices rise; among the rest, the prices "of gold and silver articles, and it becomes an object as "before to procure coin in order to convert it into bullion. "There is no longer any coin in circulation, but if the paper "is convertible, coin may still be obtained from the issuers in "exchange for notes. All additional notes, therefore, which "are attempted to be forced into circulation after the metals "have been completely superseded will return upon the "issuer in exchange for coin, and they will not be able to "maintain in circulation such a quantity of convertible paper "as to sink its value below the metal which it represents. It "is not so, however, with an inconvertible currency. To the "increase of that, if permitted by law, there is no check. "The issuers may add to it indefinitely, lowering its value "and raising prices in proportion. They may in other words "depreciate the currency without limit. Such a power in "whomsoever vested is an intolerable evil. Great as this evil

"would be if it depended only on accident, it is still greater "when placed at the arbitrary disposal of a single man or "body of men, who may have any kind or degree of interest "to be served by an artificial fluctuation in fortunes."

Mr. Mill then discusses certain plans for an inconvertible currency limited in its amount to the amount of bullion it displaces, and after showing their consequences thus concludes. "There is, therefore, a great preponderance of rea- "sons in favor of a convertible in preference to even the best "regulated inconvertible currency. The temptation to over "issue in certain financial emergencies is so strong that noth- "ing is admissible which can tend in however slight a degree "to weaken the barriers that restrain it."

That is, by the issue of inconvertible, notes compulsorily circulated, Government in addition to the fact that it obtains from them nothing more than the capital they actually represent imposes a most intolerable burden on the nation by giving it a substitute for currency that necessarily depreciates from its nominal value by each successive issue; and which in its progressive development, scarcely possesses a single element required in a useful representative of a medium of exchange. In relation to the evils produced by debasement of the coin (and those produced by an over issue of paper currency are the same.) Mr. Macauley says in the 4th vol. of his history of England, p. 565, "It may well be "doubted whether all the misery which had been inflicted on "the English nation in a quarter of a century by bad kings, "bad ministers, bad parliaments, and bad judges, was equal "to the misery caused in a single year by bad crowns and "bad shillings."

It is a common argument of the supporters of the policy of this law to claim that such bills issued by Government represent the whole capital of the nation, or have a foundation of actual property to rest on. Trite and shallow as the argument is, it is again urged by Mr. Tremain and Mr. Porter. On this subject Mr. Mill, in the same work above quoted, p.

79, says, "These phrases if they mean anything, mean that "the issuers of the paper must have property either of their "own or that of others intrusted to them, to the value of all "the notes they issue, though for what purpose does not very "clearly appear, for if the property cannot be claimed in "exchange for the notes, it is difficult to divine in what man- "ner its mere existence can serve to uphold their value. I "presume, however, it is intended as a guarantee that the "holders would be finally reimbursed in case any untoward "event should cause the whole concern to be wound up. On "this theory there have been many schemes for coining the "whole land of the country into money and the like. In so "far as this notion has any connection at all with reason, it "seems to originate in confounding two entirely distinct evils "to which a paper currency is liable. One is the insolvency "of the issuers. To this evil paper credit is equally liable, "however moderately used, and against it the security is of "undoubted value. But the theory takes no account of "another evil which is incident to the notes of the most "solvent firm, company, or Government, that of being depre- "ciated in value from being issued in excessive quantity. "The assignats, during the French revolution, were a model "of currency grounded on these principles. They represented "an immense amount of highly valuable property," and yet their fate is well known.

This reasoning of Mr. Mill would seem conclusive, and not less so, that the effect is perhaps not traced to the final cause.

Prices (*i. e.* the relative value of money to all other commodities) are of course controlled by the amount of money in the market available for the purchase of commodities to be sold. If all commodities consisted of one hundred bushels of wheat and the money in the market for purchase were one hundred dollars, the wheat would be worth one dollar per bushel. If now the currency were doubled the wheat would be worth two dollars per bushel.

So every increase in the currency produces a corresponding increase in prices.

Now, as we have seen, an increase of a metalic or convertible currency beyond the amount of capital required to be in that form for purposes of exchange, can only be temporary; for the excess, if metalic will be melted and manufactured, or exported, and if convertible, the excess will be converted and prices would soon return to their original point.

But in case of the hundred bushels of wheat, if the currency is increased by the issue of two hundred dollars of inconvertible paper, the metal currency will be, as we have seen, driven out of circulation. The rise of prices will thus be permanent so long as the paper remains inconvertible. But although the bushel of wheat will be worth two dollars of paper, it will still be worth but one dollar in gold, because the currency has only been increased by exchanging one hundred metal dollars for two hundred paper dollars, thus making the one hundred metal dollars *represented* by two hundred paper dollars, or one metal dollar by two of paper. The cause then of the permanent rise in prices is the failure of the paper to represent the metalic currency, and the rise in prices is precisely in proportion to the difference between the nominal or purporting representation and the real representation.

The probabilities of an early or remote resumption of the convertible character of the bills by a so called solvent Government, is merely another mode of stating the capital the bills really represent. If a so called solvent house or Government, *i. e.*, one that will in the future be able to pay, should issue inconvertible demand bills, these bills would purport to represent a certain amount of money or capital reducible to immediate possession—they would in reality represent a certain amount of money or capital reducible to possession only in the future and subject to future contingencies which future interest would be worth a less amount in actual present possession. The bill while purporting to

represent one dollar, would in reality, if immediate payment according to its tenor were demanded and *enforced*, represent but say ninety cents. To suppose then the inconvertible notes of a perfectly solvent firm or State is to suppose a paradox. A firm unable and not merely unwilling to make the necessary sacrifices to meet its paper is not solvent, (and unwillingness will have the same effect as inability in depreciating its paper if it causes its representation to cease to be real.)

Its insolvency may be temporary or it may be final. If temporary, or in mercantile phrase a suspension, its credit or the credit of its notes increases as the firm acquires capital to be represented by its notes.

In the case then of a depreciation of a paper substitute for currency whether caused by the so called over issue of a firm or Government that will again be solvent or by a final loss of credit, the real cause of the depreciation is the same, *i. e.:* the failure of the paper to represent what it *purports* to represent. Experience has proved the truth of these inferences. The old Bank of France, the French assignats and mandats, the Continental money of our Revolution, the Bank of England notes during the suspension, our own legal tender notes now, the present Confederate money, all have been or are depreciated in the exact proportion in which they have ceased to represent the capital they purported or purport to represent. The Confederate depreciation is worse than ours only because the difference between its actual and purporting representation has been greater.

Nor is it true, as Mr. Porter says, that the evils caused by these notes are the price of successful warfare. The French assignats and mandats had run their course in about two years, and in the midst of war, on the 16th of July, 1796. (1 Allison, 485.) France returned to a metallic currency. On that metallic currency she waged a continental war of nineteen years. England so restricted her issues as comparatively not to produce much harm.

Our own continental bills were first issued in 1775 by Congress, were not made a legal tender, and yet the first issue of $3,000,000 circulated at par. As they began to depreciate they were made a legal tender, and yet in 1780 they had become so depreciated as to cease to circulate. (2d Pitkin's Hist. U. S., 157.) Yet the war lasted three years longer. To say that their issue in our present difficulties was imperative, and necesssary to the existence of the Government, is simply begging the whole question. History fails to record a single instance of their beneficial effects, and singularly enough Governments rush to their use as to a certain panacea, and only perceive their uselessness when learned by their own sad experience. The South has progressed further in this lesson than we. Listen now to their mourning in the words of one of their ablest statesmen, and then say whether if we travel the same road we are likely to reach a different end.

"The following is an extract from a letter of Robert "Toombs to the Georgia Constitution, dated August 12, 1863:"

"The Confederate Government have committed two radi- "cal errors in the management of our finances which have "produced our present calamitous condition, by the operation "of laws of currency as fixed and immutable as the laws "which govern the planetary system. * * * * The "first great error was in attempting to carry on a great and "expensive war solely on credit without taxation. When "this revolution commenced, our currency was in excess of "the wants of society; the proof is, that nearly all the banks "within the Confederate States had suspended cash pay- "ments, and their notes had depreciated. Therefore, the "first Treasury Note which was put into circulation added "to its nominal value. This excess each succeeding issue "enlarged, and increased the depreciation of the whole mass. "This depreciation soon began to manifest itself in the rise of "commodities. Yet, the Goverment has unwisely continued

"daily, *by a forced circulation* to add to this excess, increase "this depreciation, enhance the price of all the commodities "which it is compelled to purchase, and is thus exhausting "the national resources in the ratio of geometrical progres- "sion. This ruinous policy would have long since run its "course, but for the fact that *law, intimidation, and above all, "the ardent, sincere, honest, but mistaken patriotism* of the peo- "ple have been invoked to uphold it. But the principle "being radically wrong, no human power could uphold it "long; and in spite of all these powerful proofs, our national "currency is depreciated more than one thousand per cent "below gold and silver, and four hundred per cent below "suspended bank notes, and prices and payments are rapidly "adjusting themselves to the inexorable fact.

"Let us suppose that we have five hundred millions of "currency now in circulation, with fifty millions of standard "bullion. The issue of an additional five hundred millions "of such currency will not add a single dollar to its value. "The thousand millions will be worth no more than the five "hundred millions were before the last issue, to wit: fifty "millions of bullion. The addition has only depreciated the "whole currency by one-half, and the depreciation will inva- "riably exhibit itself in the rise of the commodities for which "it was exchanged. The Government therefore, if it expends "the additional issue in commodities, loses first, the whole "amount of depreciation existing at the beginning, and also "all the additional depreciation produced by its daily expen- "diture, and the holders lose one-half the value of the notes."

* * * * * * * *

What then is the nature of this power claimed by the General Government? It is the power to declare that credit is worth more than the capital it represents. That the right to possess is more valuable than the possession itself. The shadow preferable to the substance. That the promise of the Government to pay should be worth more than the capital or value with which the promise is to be fulfilled. The

power of creating a value without production, or in few words, the power of doing what *cannot* be done, though the effort to do it may produce incalculable misery.

Now let us compare this proposed legislation of the General Government with those principles which we have found to be the test of the constitutionality of a law.

1st. Is the object or end of the law the exercise of a granted power; or in other words, is the subject matter of the law a subject over which Congress has been granted sovereign power.

It is claimed by Mr. Roelker that the object of this bill is to coin money.

Mr. Roelker's argument is briefly this:

That Congress has power to coin money. That coining money does not mean hard or metallic money, but generally anything that is used as a substitute for money. "That "Congress has power to coin money, meaning the generic "term of money; whatever money is they shall have the "power to coin or create." And because credit in the shape of bank notes is commonly or in its generic sense called money, therefore Congress has power to coin or create bank notes. That Congress has power to debase the coin to any degree, why not, therefore, make certain prices of paper bearing certain inscriptions money? Congress is not limited to the use of gold and silver for coinage—why may it not use paper? Congress may and has made its debased coin a legal tender—why not its coined paper?

Mr. Curtiss answers this argument by three propositions.

1st. That the coinage clause of the Constitution contemplates money of the precious metals in the form of coin as a measure and standard of values.

2d. That the power to regulate the value of such money means only a power to ascertain and certify the quantity of pure gold and silver embraced in each coin, and to give to it the denomination required by the national system of notation according to its relation to the unit adopted for that system.

3d. That this power necessarily excludes an arbitrary valuation of paper as money.

Mr. Curtiss sustains these propositions with much ingenuity and force; still we think the true answer to Mr. Roelker's argument is much more simple and conclusive.

Let us take Mr. Roelker's own definition of money. "Money is that general medium of exchange by reference to which the value of other things is estimated, and by the instrumentality of which the exchange of labor and commodities is effected.

Now are values estimated by reference to the bank note or by reference to the specie which the bank note promises to pay? Or if bank notes are money what is credit? Or if credit in the form of bank notes is money, why is not any other form of credit equally the thing promised; as if credit when it promises to pay money is money, why is not credit cotton when it promises to pay cotton?

The argument that they are money because they are generally called money, would prove that the sun revolves around the earth because it is commonly said to rise and set. Again, Congress has power, says Mr. Roelker, to coin or create money. How create? If it can create, it might as well create gold and silver at once. Coining is not creating, unless in a forced and unnatural sense of both words. Government does not create gold and silver money. It certifies to the quantity and quality of the material used, and makes the material when thus certified, a legal tender. That is all—nothing else. Now we will concede to Government the same power over paper. The framers of the Constitution undoubtedly supposed that the precious metals would be selected by Congress as the material for its coinage. But we do not think with Mr. Curtiss that the coinage clause includes any such restriction. We think the choice of the material entirely left to Congress. If, in the process of time, other material should be found better adapted to serve the purpose of money than gold and silver, we think Congress would have the right to use it, and the

subject being within the discretion of Congress, its decision would be final.

But whatever material is chosen must have an exchangeable value. Mr. Roelker's own definition of money requires this. He says "Money is that general medium of exchange, &c."

Now, a material cannot be a medium of exchange unless it has an exchangeable value. Atmospheric air could not be such a medium, because although of the highest value as a necessity of life, it has no exchangeable value. If, therefore, by this bill, Congress had adopted paper as the material of money, and had provided that a certain quantity of paper should be stamped or coined in a certain style, and should be denominated one dollar or five dollars, and should be a legal tender, we would concede it to be money, and the law to be Constitutional. Such a law would differ in degree, though not in kind from the anciently practiced debasement of coin. It would be extremely inexpedient, impolitic, unjust and absurd; but it would not be unconstitutional.

But this act makes no such provision. It does not repeal or interfere with prior existing laws as to coinage, or the material of coinage. It does not fix either the quantity or quality of the paper.

It does not, in any manner, attempt to make paper as a material, "the medium of exchange."

It attempts to give to a promise to pay money—the attributes of money itself—to make the promise equal the fulfillment. Promissory notes or bills of credit are, as we have seen, a phase of credit. They are evidences of indebtedness. This bill would make the acknowledgment of a debt, or the giving an evidence of its existence, equivalent to its payment or cancellation. Nay, it would even do more. If the United States has credit, if its promise to pay a dollar really represented a dollar, the legal tender clause would be unnecessary. No one would refuse a check when the money is in the bank. But when the United States has no credit, or only an impaired credit, then the framers of this law would help its credit by

the legal tender clause, i. e.: they would legislate credit into existence, or in other words, they would *create credit.*

We have already seen that credit is not a value. It is not a tangible thing, it can only exist and does only exist as the representation of value. It is only a representation. To create it you must first create the thing represented.

But the clear purpose or aim of this law is to create credit.

Mr. Roelker himself perceives and admits the difference between money or capital and credit, though without understanding its nature.

On page 166, in opposing the necessity for gold and silver money, he says "we shall return to barbarism if we do not use the credit system. We pay debts by credits. On page 179, "debts are paid by credit." If money and credit then, even according to Mr. Roelker, are not synonymous if they are different and to a certain extent antagonistic as the substance is opposed to the shadow, if as we have seen the purpose or end of this law is to create credit; if the subject matter of the legislation is credit and not money, then in order to uphold its constitutionality we must find in the Constitution that clause that gives to Congress the power to create credit or that makes credit the subject matter of congressional legislation.

We would define the coinage clause of the Constitution somewhat differently from Mr. Curtiss. We would say:

1st. The clause contemplated money made of a material of exchangeable value of a certain or standard quality and quantity, and so by its denomination certified to be.

2d. That the power to regulate the value of such money means only the power to prescribe a system of notation, and ascertain and prescribe the relative value to each other in that system of the different coins authorized, according to the quantity and quality of the material embraced in each coin, and also of foreign coin.

3d. That this power does not include a power to create credit or regulate its value.

Congress thus has nothing to do with providing a circulating medium or medium of exchange. Congress can only coin money which consists in stamping a circulating medium and making it when so stamped a legal tender. Both these things must be done by Congress in order to turn the mere medium of exchange into money. Those are the things that Congress has to do in order to coin money, but the medium of exchange itself must be provided by the members of the community. Congress could not provide the medium unless it engaged in the process of production either by working the mines or by commerce.

In order then to have money, the medium must first be provided by the community, and it must then be coined and declared a legal tender in order to make it money.

Credit will not do for this because credit is not a medium of exchange, but only may represent a medium of exchange. Therefore credit cannot be money, though it may represent money.

This construction concedes much more than that of Mr. Curtiss. It would give to Congress the right to coin money out of paper, but we find nothing in it to authorize the creating of credit.

After answering the argument founded on the coining money clause, Mr. Curtiss turns to the affirmative part of his argument.

His argument is that Congress has no authority over contracts or their obligations, except to discharge them by a uniform bankrupt law. That it is immaterial that the prohibition to impair the obligation of contracts is addressed only to the States and not to Congress. That the question is on the existence of a positive power to prescribe what shall be a legal tender in discharge of a debt. Mr. Curtiss denies this power. He does not deny the constitutionality of the laws of Congress making coin a legal tender, but he claims that such laws were not the exercise of any such positive power to prescribe what shall be a legal tender in discharge

of a debt. He declares such laws to mean nothing more than this—that the coins issued under those acts are certified to be of a regulated value and may be employed under the laws of the States as gold and silver coin.

The power, says Mr. Curtiss, "which has been exercised "in these various acts of Congress making coin a legal ten- "der does not depend on any substantive power over the "obligation of a contract. It depends simply on the power "to make a standard of value, and to issue and stamp that "coin which is to be the sole means of tender under the laws "of the States if the States chose to have a tender law."

Such reasoning, we confess, does not seem to us very satisfactory.

The legal tender laws do in fact prescribe what shall be a legal tender. Those acts authorize the coining of certain coins, and they prescribe that those coins shall be a legal tender in discharge of a debt. Were the tender clause, absent the coins as we have seen, would not be money but mere bullion with a certificate no one is compelled to accept.

By an alteration of the quantity or quality of those coins, Congress may and has affected the obligation of contracts The constitutionality of these laws has been conceded throughout the whole national existence by all branches of the Government. They are an essential part of the power of coining money. Without them the product of the coinage process cannot be money.

It seems to us impossible to admit their constitutionality, and at the same time claim that Congress has not any power on the subject of a tender or any control over the obligation of a contract; for the simple reason that being a legal tender is inseparable from the idea of money—if not a legal tender it is not money. It seems to us that the whole difficulty and want of conclusiveness in Mr. Curtiss' argument arises from an effort to try the constitutionality of a law of Congress by an erroneous test, *i. e.:* Whether or not it impairs the obligation of contracts. Mr. Curtiss might claim that he did not

make that the test, but that the test was whether it assumed to legislate over contracts except by establishing uniform bankrupt laws. The difference is not much more than a distinction.

This law does not assume to act upon contracts any more or less than a law that makes coin a legal tender. It can possibly affect only such of these as existed before the passage of the law. The law makes these notes money, therefore any contract to pay money, made after the law, would be a contract to pay these notes. If the contract were to do something else, and a breach occurred, and an action were brought for damages, the judgment would be for as many of those notes as would compensate for the damages.

After the law there might be a contract to deliver so much bullion, and a judgment for damages on the breach would be for as many notes as would equal the value of the bullion. If the notes were money and were less valuable than gold coin, the judgment would be numerically larger than if coin were the only money. So that the power of prescribing what is money does not legislate upon contracts at all, except incidentally upon past contracts. The objection would then require to be based upon the impairing the obligation of contracts.

Aside from the fact that, even according to Mr. Curtiss, the impairing is not a test of the constitutionality of United States laws, its results would be very unsatisfactory. It would simply exempt past contracts from its operation.

The truth is, that legislation upon contracts is not made or recognized by the Constitution as one of the divisions of sovereignty. It is not a power; it may be a means, but it is not an end. Congress has many express powers, the exercise of which, necessarily includes a legislation on the subject of contracts.

The power of regulating commerce is a power that deals wholly with contracts. The laying an embargo; the declaration of war; the making of treaties; the making of rules

concerning captures on land and water, may and do all of them, affect contracts quite as much as a bankrupt law, and much more directly than this legal tender law.

True, Mr. Curtiss might reply, that in all those cases the act is done for the purpose of executing a certain specific power. We concede the full force of the objection; all we claim is, that if such laws were not passed for the purpose of executing some certain specified power, they would be equally unconstitutional, even though they did not impair the obligation of contracts, or legislate upon the subject of contracts. In other words, that whether contracts are the subject matter of the law is not the test, and that no sound argument can be based on it, and even on his own theory Mr. Curtiss' argument is radically deficient in not attempting or showing any philosophical division or separation of sovereignty in which the power over contracts should be recognized as one of the parts.

If he claims that Congress has no power to make contracts the subject matter of legislation, he should at least show that legislation over contracts partakes of the nature of a power, and not of a mere means to execute other powers.

But in recognizing the constitutionality of the laws making coin a tender, Mr. Curtiss says that that "*power* does not depend on any substantive power over the obligations of a contract, but" on the power to make a standard of value, &c. That is, in the terminology we have adopted in this article, the declaring that coin is a legal tender, is not in itself, a substantive power over contracts, but is a mere means of carrying out or exercising the power to coin money.

Mr. Curtiss, here approaches the true argument but fails to carry it out. Let us see what it is. Let us apply to the constitutionality of the laws declaring coin a legal tender, the same tests we have before laid down.

1st. Is the object or end of them the exercise of a granted power? That is, is their object the exercise of the power to coin money? For, if not this, it could be none other of the granted powers.

2d. Are they necessary and proper, or useful and conducive to that end?

Now, as to the first test, we find that the most important part of the idea presented by the word money is, that it should be a legal tender. That we should be able with it to pay all our debts. That a coin, as a foreign coin, which is not a legal tender, is not money, and has no other relation to money than any other article of exchangeable value. We therefore find that the power to coin money means *ex vi termini*, the power to make some article of exchangeable value a legal tender. It is not a means, it is an end. It is one of the qualities or attributes of money, without which, it would cease to be money.

Making an article of exchangeable value a legal tender then being the end; these laws are certainly conducive to that end.

These views not only put the constitutionality of the tender laws as to coin upon a sound basis, but at the same time refute the arguments of the friends of this law. It shows the fallacy of their argument, that as the power to declare coin a legal tender is incident to the power to coin money, so the power to declare Treasury Notes a legal tender, is incident to some one of the other specified powers though which is not stated. 1st. Because it shows that declaring coin to be a legal tender is not a means or incident, but is the very power itself; therefore no incidental power or means in that respect has ever been claimed or exercised, and 2d. Because it shows that the object of this Treasury Note law is not to coin money, but to create credit; because although it declares credit to be a legal tender, that credit is not an article of exchangeable value, and therefore making or declaring it a legal tender cannot be coining money; for to be money, it must not only be a legal tender, but must be of exchangeable value. The law does not propose to alter the material of money—to coin money out of paper, but to create credit, and a declaration by Congress

that credit is money, or that credit shall be a legal tender, is not coining money.

Therefore, we find that, coining money is not the end of this law, and we, from that, conclusively argue that, making these notes a legal tender cannot be constitutional, as necessary and proper, or useful and conducive to the exercise of the power of coining money. If it be constitutional, it must be under some other power. It is useless and inconclusive to talk of its effect on, or reference to contracts. It is sufficient that whatever its effect on contracts, it is not coining money. It cannot be supported on the same gronnd that laws making coin a legal tender are supported.

Few people would admit, on looking at this law, that its object was to legislate as to contracts, but all must admit that its object is to make credit money; no such power being granted to Congress its unconstitutionality cannot be doubted.

Mr. Curtiss' argument in a word is this: The object of this law is legislation upon contracts. Congress has no power to legislate on that subject—therefore the law is unconstitutional. We would alter this argument simply by saying that the object of the law is to make credit money. That Congress has no such power, therefore the law is unconstitutional.

It remains to consider the affirmative arguments of the other counsel for the constitutionality of the law.

They all rely to some extent on the fact that though the States are, the United States are not, forbidden either to make nothing but gold and silver coin a legal tender in payment of debts or to emit bills of credit.

Mr. Tremain thinks that "the retention" of the clause, "emit bills of credit" as it was reported in the original draft of the Constitution was opposed by some members on the express ground that the power was already included among the incidental powers conferred, and cites that in the convention "Mr. Morris said—striking out the words will leave "room still for the notes of a responsible minister which

"will do all the good without the mischief." Mr. Gorham "said, "the power, so far as it will be necessary or safe, is "included in that of borrowing." The whole of this debate is quoted by Mr. Curtis, on pages 39, 40, 41 of the arguments.

These quotations clearly show that both Mr. Morris and Mr. Gorham regarded the words "and emit bills" as valuable, and as including some power that would be lost by their omission, or in other words they thought that there was a difference in the power as conferred by the words emit bills and as included in what Mr. Tremain calls the incidental or implied powers. What is that difference? Is it not simply that without the words they could be used only as credit, with them they could be made a legal tender. The issue of the notes of a responsible minister or the borrowing of money and giving treasury notes therefor would be a simple act of business within the power of any individual or business corporation.

There is nothing about such a transaction in the nature of a sovereign power. Such bills, if issued in small denominations, might be used by the community as a representative of a circulating medium. If the credit of the Government were good and the bills readily paid on presentation, they no doubt would be so used, the same as our State Bank notes are now; but if their credit became impaired, they would doubtless be thrown out as are now the bills of suspended banks. They would still, however, have a certain market price unless the credit of the Government were totally destroyed. Mr. Noyes says that in 1837, the U. S. Treasury notes did so circulate as a medium (representative of money) in large transactions.

They would not, however, be money; the use of them by the community would be optional. If depreciated by excessive issue or otherwise, so as not to represent what they purported to represent, they could be discarded. But if the words "to emit bills" had been retained, their circulation could have been made compulsory. They could have been

made a legal tender. That would not have been a mere business transaction. Nothing could give them that quality but an exercise of sovereign power.

That could not be included among Mr. Tremain's implied or incidental powers.

The issuing of bills to circulate as money is not a sovereign power. Any individual may do it unless the laws specially forbid it. It is not a franchise unless by prohibition. But compelling the community to receive them in payment of debts—forcing their circulation, is a sovereign power and can only be done by the sovereign.

Any one may manufacture pieces or forms of gold of a certain quantity or quality and sell them for merchandise, and thus circulate them in the community and the community may use them as a medium of exchange, but the sovereign only can coin the article that will be recognized by the laws and the courts as money, and which the community will be compelled to receive as money, including its quality of being a legal tender.

Therefore it is that while we admit the right of Congress as the guardian of the public credit to borrow money and to issue bills, we deny to it the possession of the sovereign power to compel the community to receive as money anything but coined money; because it has power to declare anything a legal tender, only as the declaring it a legal tender is included in or is a part of the power of coining money.

Let the money be coined of whatever material they will, still it must be coined money and not credit.

We thus think that so far as the constitutional debates are concerned, they show a clear intention on the part of the convention not to grant to Congress the power to make credit a legal tender or money. Still we admit with Mr. Noyes that the debates are not a sure guide and that they do not control. Let us examine then the further arguments of the counsel for the law. It is exceedingly difficult to state these arguments. They are discursive, rambling,

unsatisfactory. No one of them fixes upon any one power, the exercise of which is the object of the law. They deal almost exclusively in generalities.

On reading Mr. Curtiss' argument one can understand on what ground he claims the law to be unconstitutional, but it is difficult to arrive at any such understanding of the arguments of the gentlemen opposed unless it be that they claim it to be constitutional on all grounds—a theory altogether too general to be intelligibly discussed. Mr. Porter, for instance, starts with naming fourteen powers besides the *inherent* sovereign power before mentioned, or in other words, the whole Constitution and *a little more*, the exercise of which is the object of this law. Mr. Tremain confines himself to citing five express powers, stating, however, that they are *all* he deems it necessary to cite, thus implying that he could cite others if he chose. Mr. Noyes also quoted the whole eighth section of the first article as the basis of his argument. As a mere single instance of the extraordinary looseness of the style of argument adopted by these gentlemen, we will quote a sentence from Mr. Noyes. After enumerating the power conferred on Congress by the Constitution, he says:

"That body possesses an omnipotence in those things "equal to that possessed by the British Parliament, especially "if there be no express prohibition or restriction on its "exercise. No prohibitions or restrictions are to be found "in regard to any of those powers expressly conferred in "order to constitute and perpetuate the nation."

Is that so? The power to support armies is restricted to appropriations for not more than two years. To regulate commerce is restricted so that Congress could not prohibit the importation of slaves prior to 1808. To lay and collect taxes is restricted as to duties, imports and excises to such as are uniform throughout the United States, and no capitation or direct tax can be laid but in proportion to the census.

The use of certain means to carry out these powers is thus prohibited. These are but a few of many instances that could be cited. Now will Mr. Noyes say that the power to lay and collect taxes was not conferred in order to constitute and perpetuate the nation, or will he claim that the power is unrestricted in opposition to the express words of the Constitution?

We apprehend he would do neither, but would admit that his argument, even if *patriotic*, is unsound.

Mr. Porter's fiscal budget of sixteen hundred millions, besides all else that could be collected for the year 1863, is another instance of this loose style of argument, while Mr. Tremain is not behind hand, when he says the case calls for a construction of the implied powers granted in sub. 17, of sec. 8, which subdivision he immediately states granted no new powers.

We think however, notwithstanding the difficulty that the main theory or argument of these gentlemen may be thus stated: That the Constitution was intended to establish a first class nation, and to endure perpetually.

That it was intended to give to the Government all such powers as should be necessary to the working and perpetuating of a first class nation. That it necessarily must have all the powers necessary to the perpetuating of its own existence. That a great crisis has now arisen, of which, the courts must take judicial notice. That this law is necessary to preserve and perpetuate the country, and is useful to that end. Therefore, the power must be granted; therefore it is found in the Constitution, if not in one place, then in another, and if in no particular place, then in the whole as a kind of inherent or residuary power.

The legislative and executive branches have decided that the power does exist, and "it is the duty of a sound, consti-"tutional, and a *patriotic* judiciary to place itself in harmony "with the other departments of Government upon such a "question."

It will be remarked that, in all their arguments, the necessity and benefit of this law is assumed, and they argue therefrom, that it must be found in the Constitution.

Mr. Porter, indeed at times, seems bold enough to dispense entirely with the Constitution. He talks of an inherent sovereign power not prohibited by the Constitution. Arguments, p. 131. We have heard of extreme degrees of liberalism in construing the powers granted by the Constitution, but we fancy the idea of conceding to the Government such powers as are not granted, under the name of "*inherent*" powers, original with Mr. Porter. We had supposed that all constructionists agreed that the Government was one of delegated powers, and had only such as were delegated; but Mr. Porter has the new theory, that the powers are divided into such as are delegated, whether express or incidental, and such as are inherent. He thus stands in the novel position of attempting to prove a law in accordance with the Constitution, by showing that it exists outside the Constitution. If the Government may claim one sovereign power not granted on the ground that it is inherent, why not any other?

So far, however, from the necessity proving the Constitutionality, we think, on the contrary, the only sound or safe rule to be that if the power is not found in the Constitution then we must conclusively infer and decide that it is not beneficial or necessary, or conducive to the preservation or perpetuity of the Government.

The arguments of counsel are somewhat specious, because they mix up the questions of which Congress is confessedly the judge, with those of which the judiciary is the judge, and with those of which the constitutional convention was the judge. It belonged to the convention alone to decide what powers should be granted to the General Government, what powers would promote the objects recited in the preamble. The convention did decide those questions, and it also provided in the constitution a mode, and the only mode for reviewing its decision. The only test as to what powers are

useful or conducive to the effecting the objects recited in the preamble, is whether they are specifically granted in the constitution. Whether they are so granted is a question for the ultimate decision of the judiciary alone; and the principle is as old as the existence of the courts, that their existence must be decided by rules of strict construction. But when we pass beyond the question of powers to that of means from what Mr. Tremain calls express to what he calls implied powers, we concede to Congress the fullest choice of means—that the degree of the necessity or usefulness of a law is solely within the discretion of Congress. We only claim that the power which it endeavors to exercise should be one of the specifically granted powers. It is useless then for them to claim that the courts should take judicial notice of the state of the country. We concede that if under any conceivable circumstances a law would be useful and conducive to the exercise of a granted power Congress alone is the judge of the existence of those circumstances. But we claim that no possible circumstances can make Constitutional the exercise of a power not granted.

Now not one of these gentlemen has tha hardihood to state that the object of this law is the exercise of the power of borrowing money, or raising or supporting armies, or providing or maintaining a navy, or regulating commerce, or laying and collecting taxes. There is indeed a general assertion that the law is useful and conducive to the exercise of all these and other powers, but no one claims that the object of the law was to carry out those powers. Mr. Roelker alone with a lawyerlike straight forwardness claims that its object was to coin money. If its object was to coin money Congress has not regarded it as effecting that object, for while the laws requiring the payment of duties in money, and not in kind, exist, this law provides that such duties cannot be paid in these notes, and numerous bonds are now issued under authority of Congress, promising to pay in current *gold* coin —showing a recognition by Congress that these notes are not

current money or coin, or its equivalent. If the notes are money of the United States, what effect can there be to the stipulations in the 5-20 bonds to pay interest in coin? Coin is lawful money; and if the notes, also, are lawful money, a stipulation to pay coin would be satisfied by paying notes. It certainly would be in the case of a private individual. Is there any difference in legal liability in the case of the Government, or how can the Government in the face of its law, making notes money, and using the same denomination, yet recognize that they are not money by stipulating to pay coin? Is not the act self-stultification?

And even as to conducing to these other objects or powers in some remote manner, the fallacy of their argument is plain.

Does the issuing of a note that purports to represent more than it does represent, and which will only be taken in exchange at what it does represent, enable the issuer to borrow money, or to support armies, or maintain a navy, or regulate commerce, or lay and collect taxes or pay debts. True. as to debts, it may enable the issuer to repudiate a part of the debt or even the whole—but that is not paying them.

And while we say the object of the law is not to carry out or exercise any of the granted powers, we insist that the clear purpose and object of the law is the exercise of another power not granted. That is, the power to make something other than money to perform all the offices of money—the power to declare that credit is money. The power to make credit a legal tender, *i. e.*, to give it one of the attributes of money. The framers of the Constitution learned by bitter experience that such a power was altogether illusory. That human legislation is not godlike. That it cannot create by its own *ipse dixit*. That its declaring that iron is gold will not in the least alter the nature of either, and that declaring credit money is no more effectual. That it is a kind of Canute and the sea—legislation, the effect of which may be mortification and failure, but never prosperity or success. They

therefore declined to grant to the servants of the people, either State or Federal, this useless and dangerous power; useless because its purpose could never be effected; dangerous, because the effort to effect it was sure to produce disaster. To say that we must in our necessities resort to this remedy because other nations have done so, is like saying that we can swallow poison because other people have; equally ignoring the consequences of physical death or sickness in the one case and national loss or ruin in the other. Concluding then that there is no specifically granted power, the exercise of which is the object of this law, we find it unconstitutional by the first test, and there is nothing to which to apply the second and third.

Our views on this subject correspond with those of the Constitutional Convention. The decision of our highest Courts is yet to be delivered. To us, the case seems so clear that its decision will go far to decide the further and more important question of the stability of our institutions.

During the years that have passed, man has not failed to advance somewhat in his conception of liberty as affected by Governments. The time was when liberty meant merely a right of choice of rulers—the time was when liberty meant merely the will of the majority, But the human mind is now tending to advance beyond both these ideas. The world is beginning to perceive that liberty means the least possible restraints upon individualism compatible with the public good. That political liberty consists not only in the right of choice of agents or rulers, but in the limitation of those subjects on which there shall be any ruling or government at all. We are trying to discard the *paternal* system and to rely on the individual. The idea has been perceived dimly, and the effort has been made feebly in other parts of the world. America alone perceived it clearly, and in her Constitution made it the corner stone of her system. Our liberties are protected not so much by our choice of rulers as by the fact that they have only certain powers.

To grant only certain powers to the Government was comparatively easy. The great difficulty was to prevent the exercise of others. This duty to act as the watchguard of the Constitution was confided to the judiciary. It was hoped to find in the judiciary, as constituted by the Constitution, a body of men set apart as it were both from Government and people—a separate, elevated, moderate and wise few who should pass their lives in judging who could be relied upon at all times, in all crises, and in the presence of all so called necessities to answer only as to what is written in the Constitution.

It was a great demand these framers of the Constitution made upon the integrity and dignity of humanity. They constituted a Supreme Tribunal, and demanded for it not only men free from the suspicion, even, of all the baser vices of corruption and self-seeking, but who should tower like giants far above the waves of party, strife and turmoil, that might rage around them even when waged by conflicting sovereignties; clear, calm, and uninfluenced by ought but the written law which it was given to them to expound.

Can such men be found? Are our judges men who in a conflict like the present can ignore the existence of the civil war, can close their ears to the cannon roaring round them, and their eyes to the dead men lying before them, can forbear to ask or judge whether the policy is right or wrong, and shutting themselves up with the Constitution and their own thoughts, decide whether the power is there written down, whether the people in deciding what they had the right to decide, gave or did not give the power, and thus by that test, and that test alone, decide upon its policy.

If we have such judges, and if the Constitution has been able to find such men to guard and defend it, then indeed no loss of land or men, no physical reverses or adversity, or even errors of judgment can dim the glory of America and her Constitution, for she will stand far first of all the world in the search for human happiness and human liberty.

Since writing the foregoing, the cases argued have been decided by the court, and the constitutionality of the law declared by a vote of six to two. Justices Davies, Balcom, Wright, Emott, and Marvin, write opinions in favor of the prevailing view. Mr. Justice Denio writes a dissenting opinion, in which Mr. Justice Selden concurs. In imitation of the publication of the arguments of counsel, all these opinions have been published bound together in one pamphlet. Justices Davies, Balcom, Wright and Emott, base their opinions upon the power to borrow money. Justice Marvin upon that of regulating commerce, though he also writes a few pages upon the borrowing power. All these judges agree in saying that although they think the law clearly constitutional under the borrowing power, yet they doubt not it could be quite as easily sustained under many other powers. Justice Davies cites six of these, but does not argue them. Opinions, p. 68.

In a Constitutional Government like our own, the functions of the judicial department are as we have seen of far greater importance, and of a far higher character than in differently organized communities. To comprehend and correctly decide many of the questions arising requires more than the mere lawyer, more than the mere professional learning that is the result of even the most accurate knowledge of the books. All the great and varied qualities that go to make up the accomplished statesman, the profound political philosopher, the clear-thinking political economist, and the safe conservative lawyer, are necessary elements in the character of a finished American jurist. To illustrate by the case before us, it would seem sufficiently apparent that one assuming to decide the question arising therein ought to be thoroughly acquainted with the nature and economical properties of money—should have a somewhat more clear and distinct notion of what it is than if it were not the subject matter of the discussion before him. The knowledge and the thought required are entirely outside of ordinary legal

investigation. They are not, properly speaking, legal questions or legal thoughts, and yet they are the subject matter of the positive law which the courts are called upon to administer. A thorough understanding of them is as absolutely essential to a correct and authoritative decision as would be a knowledge of the facts in an ordinary litigation to a proper application of the law.

The science of political economy so far as it treats of money, is a fact in this case. No judgment in the case can be correct which ignores or misapprehends this fact. We regret that the Judges who wrote the prevailing opinions in this case did not more fully investigate on this question of fact, or the nature of the subject matter of their case. We regret that they have seen fit to occupy so much space in the mere generalities of legal reasoning from which few will dissent, and from which the inferences are not very apparent to the neglect of a discussion of what seems to us the real point in the case.

Their opinions are extremely profuse in argument and quotations to show the general nature of our Government, its proposed perpetuity, its direct action on the people, its intended capacity for self preservation. They enlarge on the subject of implied powers, yet no one of them (aside from vague general expressions) claims that any implied power exists except as a means of carrying out some express power. They all cite and rely on Chief Justice Marshall's opinion, that "Let the end be legitimate; let it be within the scope of the "Constitution, and all the means which are appropriate, "which are plainly adapted to that end, which are not pro-"hibited, but consistent with the letter and spirit of the Con-"stitution are constitutional." We find no fault with that law. We do not think any one of the opinions claims any greater latitude of construction than is conceded in the above quotation. The Justices simply call these *means* "*incidental or implied powers.*"

Counsel in argument also called them implied powers, and the phrase is frequently used in the books by high constitutional authority.

But in every case it is apparent that by incidental or implied powers is meant the means for carrying into effect specified powers.

Our meaning being the same, we think our terminology, discarding the phrase implied powers and substituting the single word means, is much more philosophical and much better calculated to avoid confusion.

Nor do we think these positions so elaborately discussed in the opinions were at all controverted on the argument of the cause. The law, as quoted from Chief Justice Marshall, was generally acquiesced in. But whether the end of this law was legitimate—whether the means were appropriate are questions that were discussed on the argument, but which, in the opinions, receive very little attention and are argued with little more than mere assertion. Upon the very points on which we desired light they are most provokingly silent, or if not, favor us with the most unsavory crudities. For instance, Mr. Justice Marvin says that the danger of over issue of Government paper is much less if made a legal tender than of bank paper not a legal tender; (Opinions, p. 127,) while the slightest knowledge of political economy would have taught him that the rule is directly the reverse, and that there is no possibility of an over issue of paper money either by Government or banks until it is made a legal tender.

Again, they constantly speak of the intrinsic value of hard money; while it is the first element of political economy, that money like many commodities has no intrinsic, but only an exchangeable value, and that even with such articles as have an intrinsic value, political economy and the science of legislation treat only of their exchangeable value. Two of the learned judges also assure us that gold and paper are equally valuable, and that it is only for fictitious and speculative purposes, and for the settlement of foreign balances that any difference exists.

Many other passages throughout these opinions indicate the very slight attention given by the judges to the subject of the law; they apparently not being aware that a correct and complete understanding of the subject is indispensible to a proper application of the law. One error of no inconsiderable magnitude in a discussion like this, is the entire failure to distinguish between a paper currency and a irredeemable paper currency, and citing as authority for the latter what was intended to apply only to the former. For instance, they cite liberally from Calhoun, but Mr. Calhoun advocated a currency resting on demand and supply simply. Opinions, p. 39, and not forced on the community by a legal tender clause.

Mr. Calhoun advocated using the credit of the Government, but he never advocated making Government credit valuable by law.

It is no slight compliment to the ability of the Gentlemen who argued this question in favor of the law, that they have been able so fully to impress not only their views, but their style of argument on the majority of the members of the court.

On reading their opinions it is almost as difficult to discover the precise point adjudicated, as it was in the arguments the precise point urged. If they agree upon one power, to the exercise of which, this law is conducive, it is only with a sort of trembling hesitation and hurried protest that though they have happened to hit on this one power, the constitutionality of the law is equally clear as conducive to the exercise of every other power in the Constitution.

Mr. Justice Davies argues, that the law is constitutional under the power to borrow money, on two separate and distinct grounds, though the arguments for each are somewhat blended together. His first point is, that Congress having for a long time exercised the power of declaring coin a legal tender, and the power having been universally acquiesced in as constitutional, and the power being no where

expressly granted that it is necessarily an implied power. Opinions, p. 26, 27, 33.

From this he deduces the conclusion that Congress having the power to establish a legal tender, there is no reason why the exercise of the power should be confined to any particular medium. Opinions, p. 35. Therefore Congress may declare treasury notes a legal tender as well as it may gold coin. Ib. p. 35.

This reasoning first proves the constitutionality of tender laws by showing the constitutionality of laws making coin a legal tender, or in other words by showing that such laws have been regarded by all departments of the Governments as conducive to the exercise of the specific power of coining money. Then having proved the constitutionality of a legal tender law, it proves the constitutionality of this law making treasury notes a legal lender, as conducive to the exercise of the power to declare what shall be a legal tender.

From the conceded fact that Congress has power to declare coin a legal tender, he argues that it has power to declare *what* shall be a legal tender, and consequently to declare these notes a legal tender.

From the fact that it is an incidental power or means he makes the deduction that it is a principal power or end. It is difficult to say whether such reasoning was intended in good faith as argument, or as a mere specimen of mental ingenuity.

From the dignified position of the judge, and from the importance of the question he was discussing, we may perhaps incline to trust his good faith, though it must be at the expense of his judgment.

If the views of the learned judge should prevail, any limitation upon the powers of Congress, other than the express prohibitions in the Constitution would become impossible. If anything that is constitutional as a means, may in its turn become a principal, though implied power, and constitutionalize anything that would bear to it the relation of means to

an end, we will have a theory of constitutional construction to the authorship and originality of which the learned judge is fully entitled. The second point of Judge Davies is that because a legal tender law has been regarded as Constitutional as a means of carrying out the power to coin money, therefore it is constitutional as a means of carrying out the power of borrowing money. In other words in order to prove that the law is a necessary and proper means for carrying into effect one power he shows that it is necessary and proper for carrying into effect another and different power—an original style of syllogism.

We think all these gentlemen clearly mistaken in the very basis of their argument, as to the power to declare coin a legal tender being in any manner an implied power. We have already shown that the quality so to speak of being a legal tender is a necessary element of money. A thing cannot be money unless it is a legal tender—therefore the declaring coin to be a legal tender was not an implied power, but was the simple execution of the express power given by the Constitution. Judge Denio accepts this view when he says that the word money (ex vi termini) implies or means a legal tender. Opinions pp. 159, 160, and Judge Davies unconsciously admits it when he talks about the power "to declare what shall or shall not be a legal tender, or, in *other words*, *lawful money* of a country." Opinion p. 28.

It is impossible to execute the power to coin money unless the article coined is made a legal tender, for, until then, it is not money.

But it is argued by these judges that metal coin was insufficient for the vast expenditures of Government. The whole world even, could hardly supply the amount required. And yet, in order to remedy this deficiency, they propose what? To *borrow money*; and to make it still more extraordinary, they propose that the Government shall issue the very money they have just proposed it should borrow.

All of the judges except Judge Emott, are loftily indifferent to what Judge Emott calls the solecism that Congress is authorized to issue paper money as a means of borrowing money. p. 111. The learned judge thinks he has disposed of that difficulty, when he makes the word money mean capital or value, so far as the thing to be borrowed is concerned, and merely a circulating medium so far as the issue is concerned. He does not trouble himself with the fact that the very first element of a circulating medium is exchangeable value; that value is capital, and that a circulating medium must be capital. That credit in any form cannot possibly be a circulating medium, because the very essence of its nature is, that it is a promise to pay *the* circulating medium, and is not itself that medium.

The judge thinks the apparent solecism grows out of a confounding of the different shades of meaning attached to the word money. We think the shading rather too delicate to have much weight in a judicial argument.

All these judges are in favor of the policy of the law. All think it to be of great service, and think that without it we should have been ruined. All seem to think that making these bills a legal tender really adds to their purchasing power, because the person to whom they are paid, can, with them, pay his debts. Now, could it ever have occurred to these learned judges to ask themselves the question, whether Government can by law create a value? Would a statute enacting that Whereas, the Government has on hand a large amount of wild land; that the land should thereafter be worth ten dollars per acre instead of two, add eight dollars to its value? Would any one exchange the ten dollars for the land, or if an exchange were compelled by the Government, would not the purchaser lose just eight dollars?

If the Government had on hand a large amount of debased coin, and by law declared it of equal value with good coin, and compelled some banker who held good coin to exchange it for the government debased coin, would any value be

added to the debased coin, or would the banker's loss be any less because of the law passed declaring the debased coin of equal value with the good?

The purchaser of land suffers a loss, and the banker suffers a loss, but will any one pretend that any value was created, any wealth produced by the transaction? It must be remembered that Governments are but men. That though they can control the relations of men, they have no greater, generally not so great means of producing wealth, than individuals or private corporations. They cannot any more than an individual double the value of an eagle by calling it twenty dollars. They cannot add to the value of credit that represents an eagle by saying or enacting that it represents twenty dollars.

As well might they enact that two was four, or that paper was gold, or that vacuity was substance. There is but one way of creating value in this world of ours, and that is by labor, and the use of the product of labor—capital. No other mode has ever yet been discovered, and we fancy none other ever will.

Now, if the Government, on the breaking out of this rebellion found itself compelled to borrow, and that the best mode of borrowing was by the issue of its bills of credit, it must have submitted in its financial operations to the same general financial laws that control private individuals and corporations. If it issues bills, it must provide the means of paying them when they become due, otherwise they will certainly be discredited. If it issues bills for the purpose of currency, it must do as other banks of issue or individuals do, it must restrain its issue for such purposes within the bounds of the demand, and at the same time provide the means of paying such bills as may be presented. Government, no doubt, in such matters, possesses great advantage over individuals, but it is simply the advantage of a large capitalist, and of an immense business over a small one. Suppose that these notes had not been made a legal tender, but that the Government

had made use of them in all its transactions, and had refused to receive or deal in, and laid a tax on State bank bills, can any one doubt that the effect would have been to drive out the bank bills which would have been converted into specie, and to have supplied the whole demand for a paper currency by these Treasury Notes? and can any one doubt that such notes would then have kept at par so long as their issue was no greater than sufficient to supply the demand? Is not the Government larger than the banks, and so long as it was solvent, could it not control them on the same field? could it fail to surpass the banks in the effort to supply the paper currency demand of the country?

People, however, are strangely unwilling to recognize the fact that in financial matters the Government is simply a business corporation, and that its revenues being derived from taxation, does not make it any the less a mere business corporation than if they were derived from premiums on policies or profits on manufactures. They are in reality a share of the whole profits of the country. There is, too, so much ignorance upon the subject of money and credits that many think with the Judges that if the Government makes its bills a legal tender it can purchase with them a little more than it could if it had not so made them, because debtors will give for them a little more than they otherwise would. They will not or cannot understand that this is but another illustration of the effort to create value by calling it so.

If the Government could deal wholly with men who were wholly debtors, this idea might have some weight. But the difficulty is that Government deals with and acts for the whole community, and that in the whole community the sum of the debts is exactly equal to the sum of the credits; that these two characters of debtor and creditor are always more or less united in the same man, and inasmuch as Government would naturally deal rather with solvent than insolvent men, men of large rather than men of small or

borrowed capital, it would be apt to deal rather more with the creditor than the debtor class. The men dealing with Government therefore remember that though they can pay their debts with this money, so called, yet others can also pay them with the same. Consequently they will not give a penny more, or in other words, sell to the Government a penny cheaper on account of the pretended quality of paying debts. And as we would infer in theory, so it has proved in practice that a tender law has always proved to be without any tendency to arrest the depreciation of inconvertible paper.

So soon then as this depreciation takes place the legal tender clause having no tendency to increase the real value of the bills or to give them a greater purchasing power, its only possible effect is to enable existing debts to be discharged in a depreciated currency, or in other words, to compel the creditor to lose so much of his debt. It is to be observed here that we do not claim the law to be unconstitutional because it has this unjust effect on contracts, but because it has no other effect, because it is not a means of borrowing money, because giving the notes this attribute, as it is called, of paying debts does not increase their value as a security or add to their power of borrowing money or purchasing capital, and because so far as existing debts are concerned they do not *satisfy* the debts, they do not give what was promised, but on the contrary, they give something of less value and *repudiate* the difference.

We thus see what a miserable and unmeaning jargon is this talk so much indulged in by the judges in their opinions of "*imparting* to these notes the quality of satisfying debts." Repudiation is hardly yet satisfaction. And although a law may achieve repudiation it requires something more than a law to achieve satisfaction. And until we can find a law that will enable the notes to *satisfy* rather than repudiate the debt, we will be unable to add to their power of either

borrowing or purchasing capital, whether in the form of money or otherwise.

Mr. Justice Marvin alone relies on the power to regulate commerce.

It would seem to most persons very like a *non-sequiter* to argue that because Congress has power to regulate commerce, therefore it has power to provide an article of commerce. So far as coined money is concerned as an article of commerce, the Government does not provide it in any sense. It merely assays and stamps the article provided by individuals. But when Government issues notes and makes them a legal tender, it attempts to provide or create a value. It does not regulate commerce, it merely attempts to create by a law an exchangable value without producing it—an attempt which, as we have seen, must fail. Mr. Justice Marvin's whole argument is founded on this fallacy. He declares that the measure of depreciation may be greatly affected by the question whether the notes may be tendered in payment of debts; that though there may be great danger of the issues of Government paper or irredeemable bank paper in excess, the danger may be much less with Government issues made tenderable in payment of debts than in bank issues not so tenderable. (Opinions, p. 127.)

On reading this passage one would certainly think that the learned Justice had confined his reading of Mr. Mill, and of all works on political economy, to the one passage he quotes in the first part of his opinion. So far from there being any danger of *irredeemable* bank paper being issued in excess, all know that it cannot be issued at all (and Mr. Mill, of all others, has demonstrated that fact the most clearly.) And that the essential necessary point in keeping in circulation an over issue of paper is that it be made a legal tender—if not the excess is immediately presented for payment.

An argument founded on so extraordinary a premiss, cannot be very sound, and accordingly we find judge Marvin like the other judges contenting himself with a mere assertion of the principle point, and omitting all argument.

The others say making these notes a legal tender or giving them the quality of paying debts clearly adds to their value, but they do not condescend to tell us *how* it adds to their value; *how* calling a shilling a pound makes it so. So Judge Marvin asserts the great efficacy of these notes in regulating commerce, in stimulating industry and production, but he does not trouble himself to explain the detail of the process.

Under the borrowing power Mr. Justice Marvin thinks the law constitutional as being a forced loan. Opinions pp. 136, 137. We were of the opinion that forced loans, benevolences, &c., closed their career with the Life of Charles the First. It certainly is a novelty that the Federal Government possesses that extraordinary power.

But after reading through all the opinions, after witnessing the efforts to place this law in the relation of means to a number of different ends, the one question recurs upon which the Judges (except, perhaps, Judge Denio, who follows Mr. Curtiss' argument) have not vouchsafed a single word. Was the purpose of this law to borrow money or to regulate commerce, or to levy and collect taxes, or to exercise any other power granted by the Constitution? If it were not—but if the purpose were the exercise of a power not granted, then, surely its constitutionality cannot be saved by showing its possible relations to any other power; and although other parts of the law may have purposed the borrowing of money, can there be a pretence of an honest claim that this one legal tender clause had any other aim, end or purpose, than to make credit money.

Whether this decision of the Court of Appeals tends to inspire confidence in the independence and ability of the judiciary in deciding political questions under our peculiar system we leave to be determined.